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No Good Deed Goes Unpunished?  
Potential Ramifications of *Cooper Industries, Inc. v. Aviall Services, Inc.*  
on Military Procurements – Past, Present and Future

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## **I. Introduction**

“No good deed goes unpunished.”<sup>1</sup> After the Supreme Court’s decision in *Cooper Industries, Inc. v. Aviall Services, Inc.*,<sup>2</sup> it can be argued that, as the saying goes, so the way of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) contribution action follows. Was the Supreme Court decision consistent with CERCLA’s intent? What does the decision mean for government contractors seeking contribution from the United States for hazardous waste cleanup resulting from military procurements? Do future contractors with the United States have other options to avoid paying the entire cost of cleanup? Is it fair to ask the United States to contribute to a contractor’s cleanup costs in the first place?

This thesis attempts to answer these questions and, in the process, provides suggestions for the future. Section II describes the general background of contribution actions. Section III provides a detailed history of *Cooper Industries, Inc. v. Aviall Services, Inc.* (hereinafter referred to as *Aviall*). Section IV discusses the Supreme Court decision itself. Section V analyzes the potential ramifications of the Supreme Court decision. Section VI identifies potential procurement solutions that may assist contractors in the absence of a contribution action. Section VII concludes with final opinions and answers to the questions posed above.

## **II. Background of Contribution Actions**

Before predicting what will become of contribution actions in the future, it is essential to have an understanding of the genesis of contribution actions, how they evolved over time, and how they have been handled by the judicial system.

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<sup>1</sup> Clare Booth Luce *quoted in* H. FABER, *THE BOOK OF LAWS*, 1980.

<sup>2</sup> *Cooper Industries, Inc. v. Aviall Services, Inc.*, 125 S. Ct. 577 (2004).

Contribution is defined as: “The right that gives one of several persons who are liable on a common debt the ability to recover ratably from each of the others when that one party discharges the debt for the benefit of all.”<sup>3</sup> “The right to contribution arises on compulsory payment by a joint obligor of more than his share of the common obligation.”<sup>4</sup>

Contribution actions have their roots in common law. Contribution is a common law equitable remedy that is “deeply rooted in the principles of equity, fair play and justice.”<sup>5</sup> Under common law, “when two or more persons become liable in tort for the same harm, there is a right of contribution among them, even though judgment has not been recovered against all or any of them.”<sup>6</sup> The right of contribution exists only when a liable party has paid more than its fair share, when it has not intentionally caused the harm, and when there is no right of indemnity between parties.<sup>7</sup>

As will be apparent from the subsequent sections, contribution actions in environmental law have developed somewhat differently from those under common law, but it is helpful to understand its origins in common law nonetheless.

#### **A. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980**

By 1980, there was heightened public awareness of, and concern about, environmental disasters such as the one at Love Canal, New York, which resulted from

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<sup>3</sup> BLACK’S LAW DICTIONARY (8<sup>th</sup> ed. 2004).

<sup>4</sup> 18 C.J.S. *Contribution* § 7 (2004).

<sup>5</sup> *United States v. Valentine*, 856 F. Supp. 627, 631 (D. Wyo. 1994) (quoting *Aalco Manufacturing Co. v. City of Espanola*, 618 P.2d 1230, 1232 (1980)).

<sup>6</sup> RESTATEMENT (SECOND) OF TORTS § 886A(1) (1979).

<sup>7</sup> *Id.* at (2) thru (4).

years of improper hazardous waste disposal by Hooker Chemical Company.<sup>8</sup> CERCLA, more commonly referred to as the “Superfund,” was enacted on December 11, 1980,<sup>9</sup> in direct response to public concerns stemming from disasters such as the one at Love Canal. CERCLA was to “provide the means for dealing quickly and effectively with abandoned waste sites, cleaning up future spills, and discouraging careless or irresponsible actions that may release hazardous wastes to the environment.”<sup>10</sup> While not explicitly stated in the statute itself, Congress wanted to ensure “those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their action.”<sup>11</sup> This is known as the “polluter pays” principle.<sup>12</sup>

The two CERCLA sections germane to an understanding of the background of contribution actions are sections 106 and 107.<sup>13</sup> Section 106 deals with abatement actions and section 107 deals with liability. CERCLA did not contain a specific provision for contribution actions, but, as will be discussed later, courts found a right of contribution implicit in CERCLA itself.<sup>14</sup>

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<sup>8</sup> Eckhart C. Beck, *The Love Canal Tragedy*, EPA JOURNAL (Jan. 1979), available at <http://www.epa.gov/history/topics/lovecanal/01.htm>.

<sup>9</sup> Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980).

<sup>10</sup> 126 CONG. REC. S28,820 (Oct. 1, 1980) (statement of Sen. Dole).

<sup>11</sup> S. REP. NO. 848, 96<sup>th</sup> Cong., 2d Sess., 13 (1980).

<sup>12</sup> See Mark Haggerty & Stephanie A. Welcomer, *Superfund: The Ascendancy of Enabling Myths*, 37 J. ECON. ISSUES 451, 454 (2003).

<sup>13</sup> CERCLA §§ 106 & 107, 42 U.S.C. §§ 9606 & 9607.

<sup>14</sup> See *infra* section II.A.3.

## 1. Abatement Action: Section 106, 42 U.S.C. § 9606

“[W]hen the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility,”<sup>15</sup> CERCLA § 106 gives him broad power to compel cleanup of the facility. He can take any action “including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.”<sup>16</sup> President Reagan delegated much of this power to the EPA<sup>17</sup> pursuant to CERCLA § 115.<sup>18</sup>

In practice, this section allows the EPA, as designee of the President, to issue administrative orders to potentially responsible parties (PRPs), unilaterally tasking them to take remedial actions in order to clean up hazardous waste at their site.<sup>19</sup> “Unilateral orders should be considered as one of the primary enforcement tools to obtain [remedial action] response by PRPs.”<sup>20</sup>

In lieu of issuing a unilateral order or initiating a federal action to compel a PRP to clean up under § 106, the EPA may itself clean up a hazardous waste site and then seek recovery of its costs through § 107.

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<sup>15</sup> CERCLA § 106(a), 42 U.S.C. § 9606(a).

<sup>16</sup> *Id.*

<sup>17</sup> Exec. Order No. 12,316, § 3(b), 46 Fed. Reg. 42,237 (1981).

<sup>18</sup> CERCLA § 115, 42 U.S.C. § 9615.

<sup>19</sup> See BRUCE M. DIAMOND & GLENN L. UNTERBERGER, U.S. ENVIRONMENTAL PROTECTION AGENCY, OSWER DIRECTIVE NO. 9833.0-2(B), MODEL UNILATERAL ADMINISTRATIVE ORDER FOR REMEDIAL DESIGN AND REMEDIAL ACTION UNDER SECTION 106 OF CERCLA(1999), available at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/moduao-rira-rpt.pdf>.

<sup>20</sup> DON R. CLAY & JAMES M. STROCK, U.S. ENVIRONMENTAL PROTECTION AGENCY, OSWER DIRECTIVE NO. 9833.01-A, GUIDANCE ON CERCLA SECTION 106(A) UNILATERAL ADMINISTRATIVE ORDERS FOR REMEDIAL DESIGNS AND REMEDIAL ACTIONS, at 3 (1999), available at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/cerc106-uao-rpt.pdf>.

## 2. Liability: Section 107, 42 U.S.C. § 9607

Liability under CERCLA has four elements. First, there must be a release or substantial threat of release.<sup>21</sup> Second, the release or substantial threat of release must be of a hazardous substance.<sup>22</sup> Third, the release or substantial threat of release must have originated at a facility or from a vessel.<sup>23</sup> Finally, the release or substantial threat of release must have been caused by a responsible party.<sup>24</sup>

While not explicit in CERCLA itself, it is clear from case law that “[l]iability under CERCLA is strict, retroactive, and joint and several.”<sup>25</sup> A responsible party found liable under CERCLA will be responsible for:

(A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; and

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<sup>21</sup> CERCLA § 104(a)(1), 42 U.S.C. § 9604(a)(1). See CERCLA § 101(22), 42 U.S.C. § 9601(22), for the definition of release.

<sup>22</sup> 42 U.S.C. § 9604(a)(1). See CERCLA § 101(14), 42 U.S.C. § 9601(14), for the definition of hazardous substance. (The Second Circuit Court of Appeals aptly noted that “[t]he breadth of § 9601(14) cannot be easily escaped and... ‘quantity or concentration is not a factor.’” *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 720 (2d Cir. 1993) (quoting *B.F. Goodrich v. Murtha*, 958 F.2d 1192, 1200 (2d Cir. 1992))).

<sup>23</sup> 42 U.S.C. § 9604(a)(1). See CERCLA § 101(9), 42 U.S.C. § 9601(9), for the definition of facility. See CERCLA § 101(28), 42 U.S.C. § 9601(28), for the definition of vessel.

<sup>24</sup> 42 U.S.C. § 9604(a)(1); CERCLA § 107(a), 42 U.S.C. § 9607(a).

<sup>25</sup> 2 JAMES T. O'REILLY & CAROLINE B. BUENGER, RCRA AND SUPERFUND: A PRACTICE GUIDE § 14:20 (3d ed. 2004) (citing *United States v. Northeastern Pharmaceutical and Chemical Co., Inc.*, 579 F. Supp. 823 (W.D. Mo. 1984), judgment *aff'd in part, rev'd in part*, 810 F.2d 726 (8<sup>th</sup> Cir. 1986). See also *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808-810 (S.D. Ohio 1983); *United States v. Aceto Agricultural Chemicals Corp.*, 872 F.2d 1373, 1378 (8<sup>th</sup> Cir. 1989); *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 514 (2d Cir. 1996).

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.<sup>26</sup>

While it is clear from § 107(a)(4)(A) that the United States, a State or Indian tribe has the authority to file a civil action to recover the costs of cleaning up hazardous wastes from responsible parties, it is less clear from § 107(a)(4)(B) that private parties also have the authority to file these cost recovery actions.<sup>27</sup> Despite the lack of clarity in the statute itself, a majority of courts (including the Supreme Court) have agreed that private parties may, under certain circumstances, bring cost recovery actions under § 107.<sup>28</sup> What exact circumstances are required before a private party may initiate a cost recovery action under § 107 is unclear as a result of the Supreme Court's decision in *Aviall*.<sup>29</sup>

Section 107(a) lists the classes of responsible parties, and § 107(b) lists defenses available to a potentially responsible party.<sup>30</sup> The four classes of potentially responsible parties (PRPs) are current owners or operators of facilities where hazardous substances have been disposed, owners or operators of facilities at the time the hazardous substances were disposed, generators of hazardous substances who arranged for their treatment or

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<sup>26</sup> 42 U.S.C. § 9607(a)(4)(A)-(C). The Superfund Amendments and Reauthorization Act (SARA) of 1986, Pub. L. No. 99-499, 100 Stat. 1513 (1986), added section (D) which includes liability for the costs of any health assessment or health effects study carried out under section 104(i).

<sup>27</sup> 42 U.S.C. § 9607(a)(4)(A) & (B).

<sup>28</sup> See *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994); *NL Industries, Inc. v. Kaplan*, 792 F.2d 896 (9<sup>th</sup> Cir. 1986); *Walls v. Waste Resource Corp.*, 761 F.2d 311 (6<sup>th</sup> Cir. 1985); *City of Philadelphia v. Stepan Chemical Co.*, 544 F. Supp. 1135 (E.D. Pa. 1982).

<sup>29</sup> See *infra* section VI.A.

<sup>30</sup> 42 U.S.C. § 9607(a) & (b).

disposal, and transporters of hazardous substances for treatment or disposal to sites of their own choosing.<sup>31</sup>

**a. Owners/Operators: 42 U.S.C. § 9601(20)**

The first two classes of PRPs concern owners and operators. The terms owner and operator under CERCLA include current owners and operators as well as owners and/or operators at the time hazardous materials were being disposed at a facility or from a vessel.<sup>32</sup>

The term disposal<sup>33</sup> has been a source of litigation regarding liability of owners and operators.<sup>34</sup> A former owner or operator need not have been actively disposing in order to be liable: “Holding passive owners responsible for migration of contaminants that results from their conduct and for passive migration ensures the prompt and effective cleanup of abandoned storage tanks, which . . . is one of the problems Congress sought to address when enacting CERCLA.”<sup>35</sup>

Generally, a current owner of property where hazardous materials have been disposed of was liable, regardless of whether there were any hazardous materials

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<sup>31</sup> 42 U.S.C. § 9607(a)(1)-(4).

<sup>32</sup> CERCLA § 101(20)(A), 42 U.S.C. § 9601(20)(A). The Superfund Amendments and Reauthorization Act (SARA) of 1986, Pub. L. No. 99-499, 100 Stat. 1513 (1986), added sections (D)-(G), which go into greater detail on who are and who are not owners or operators in certain circumstances, a lengthy recitation of which will not add substantively to this discussion.

<sup>33</sup> CERCLA § 101(29), 42 U.S.C. § 9601(29), defines disposal as the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

<sup>34</sup> See, e.g., *United States v. 150 Acres of Land*, 204 F.3d 698, 706 (6<sup>th</sup> Cir. 2000); *United States v. CDMG Realty Co.*, 96 F.3d 706, 722 (3d Cir. 1996); *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 846 (4<sup>th</sup> Cir. 1992).

<sup>35</sup> *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 881 (9<sup>th</sup> Cir. 2001) (rejecting defendants’ argument that “disposal” should be interpreted to exclude all passive migration).

disposed of at the facility during their term of ownership, unless the owner was a truly innocent party.<sup>36</sup> The Small Business Liability Relief and Brownfields Revitalization Act<sup>37</sup> added exceptions for qualified contiguous landowners and bona fide prospective purchasers.<sup>38</sup>

In order to be liable as an operator, “an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decision about compliance with environmental regulations.”<sup>39</sup>

**b. Arrangers: *United States v. Aceto Agricultural Chemical Corp.***

The third class of PRP is

any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility owned or operated by another party or entity and containing such hazardous substances.<sup>40</sup>

The phrase “arrange for” is not defined anywhere in the statute. A test for arranger liability was first expressed by the Eighth Circuit Court of Appeals in the *Aceto* case.<sup>41</sup>

The Court interpreted the phrase in light of what they saw as the “two essential purposes

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<sup>36</sup> 42 U.S.C. § 9607(b)(3).

<sup>37</sup> Small Business Liability Relief and Brownfields Revitalization Act, Pub L. No. 107-118, 115 Stat 2356 (2002) (codified as amended in scattered sections of 42 U.S.C.).

<sup>38</sup> CERCLA § 107(q), 42 U.S.C. § 9607(q).

<sup>39</sup> *United States v. Bestfoods*, 524 U.S. 51, 66-67 (1998).

<sup>40</sup> 42 U.S.C. § 9607(a)(3).

<sup>41</sup> *Aceto Agricultural Chemicals. Corp.*, 872 F.2d at 1379-82.



of CERCLA.”<sup>42</sup> that the federal government be given the tools necessary for a prompt and effective clean up and that those responsible for the hazardous waste disposal should pay for cleaning it up.<sup>43</sup>

The Third Circuit Court of Appeals later examined the standards adopted by other courts and concluded that in conducting the analysis “the most important factors in determining ‘arranger liability’ are: (1) ownership or possession; and (2) knowledge; or (3) control.”<sup>44</sup> In other words, in order to be liable, there must be ownership or possession of a hazardous substance and either “control over the process that results in a release of hazardous waste or knowledge that such a release will occur during the process.”<sup>45</sup>

### **c. Transporters**

The last class of PRP is “any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance.”<sup>46</sup> This class of PRP does not appear to be the subject of much controversy. The key issue in litigation appears to be demonstrating the transporter selected the site.<sup>47</sup>

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<sup>42</sup> *Aceto Agricultural Chemicals. Corp.*, 872 F.2d at 1380.

<sup>43</sup> *Id.* (citing *Dedham Water Co. v. Cumberland Farms Dairy*, 805 F.2d 1074, 1081 (1<sup>st</sup> Cir. 1986)).

<sup>44</sup> *Morton Int’l, Inc. v. A.E. Staley Mfg. Co.*, 343 F.3d 669, 677 (3d Cir. 2003).

<sup>45</sup> *Id.*

<sup>46</sup> 42 U.S.C. § 9607(a)(4).

<sup>47</sup> *See, e.g., Tippins Inc. v. USX Corp.*, 37 F.3d 87, 94 (3d Cir. 1994).

### 3. CERCLA's Implied Right of Contribution: *United States v. Chem-Dyne Corp.*

As mentioned previously,<sup>48</sup> although a specific contribution provision was not written into the statute, courts before the Superfund Amendments and Reauthorization Act (SARA) of 1986 was enacted consistently found an implied right of contribution either through federal common law or through CERCLA's cost-recovery provision.<sup>49</sup> Laying the foundation for other courts, the District Court for the Southern District of Ohio noted: "Typically . . . there will be numerous hazardous substance generators or transporters who have disposed of wastes at a particular site."<sup>50</sup> Looking to common law principles, the court went on to state that "when two or more persons acting independently caused a distinct or single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he has himself caused."<sup>51</sup>

The courts that found a contribution right inherent in CERCLA believed that precluding a contribution right "would be both unjustified and unjust in that a single PRP

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<sup>48</sup> See *supra* Section II.A.

<sup>49</sup> See e.g., *Pinole Point Prop., Inc. v. Bethlehem Steel Corp.*, 596 F. Supp. 283 (N.D. Cal. 1984) (finding a PRP could seek cost recovery against other PRPs under CERCLA § 107(a)(4)(B)); *Wehner v. Syntex Agribusiness, Inc.*, 616 F. Supp. 27, 31 (E.D. Mo. 1985) (finding a right to contribution implicit in CERCLA § 107(e)(2), which states that "nothing in this subchapter...shall bar a cause of action that...any...person subject to liability under this section...has or would have, by reason of subrogation."); *United States v. New Castle County*, 642 F. Supp. 1258, 1266 (D. Del. 1986) (looking to *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), in determining a right to contribution under CERCLA is created under federal common law).

<sup>50</sup> *Chem-Dyne Corp.*, 572 F. Supp. at 810.

<sup>51</sup> *Id.* (citing RESTATEMENT (SECOND) OF TORTS §§ 433A, 881 (1965, 1979); PROSSER, LAW OF TORTS (4<sup>th</sup> ed. 1971), pp. 313-314; *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 260, (1979)).

would bear the entire cost of cleanup while other PRPs escaped all liability.<sup>52</sup> Some courts after *Chem-Dyne* even went so far as to hold that PRPs could seek cost recovery under CERCLA § 107(a)(4)(B) for response costs even where no governmental action had been taken against them under § 106 or § 107(a).<sup>53</sup> Despite this general sentiment of the majority of courts, there were still a minority of courts, pre-SARA, that refused to infer a right of contribution in CERCLA.<sup>54</sup>

### **B. Superfund Amendments and Reauthorization Act (SARA) of 1986**

Because there was still some lingering doubt whether there was a right to contribution under CERCLA and because the Supreme Court refused to imply a right of contribution in other statutes where the right was not expressly stated in the statute itself.<sup>55</sup> Congress attempted to legislatively fix the issue by amending CERCLA in the Superfund Amendments and Reauthorization Act of 1986, enacted on October 17, 1986.<sup>56</sup>

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<sup>52</sup> *Chemical Waste Management, Inc. v. Armstrong World Industries, Inc.*, 669 F. Supp. 1285, 1295 (E.D. Pa. 1987).

<sup>53</sup> See *Pinole Point Prop., Inc.*, 596 F. Supp. 283 (PRP allowed to seek recovery from another PRP where no governmental action had been taken); *NL Industries, Inc.*, 792 F.2d 896 (contribution action allowed to proceed in the absence of a lawsuit or federal administrative action against plaintiff); *Sand Springs Home v. Interplastic Corp.*, 670 F. Supp. 913 (N.S. Okla. 1987) (A PRP who voluntarily pays response costs may bring an action against other PRPs under CERCLA § 107(a)(4)(B)).

<sup>54</sup> See, e.g., *United States v. Westinghouse Electric Corp.*, 22 Env't Rep. Cas. (BNA) 1230 (S.D. Ind. 1983).

<sup>55</sup> 131 CONG. REC. S24,450 (1985).

<sup>56</sup> Superfund Amendments and Reauthorization Act (SARA) of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

## 1. Legislative History

The legislative history makes it crystal clear that SARA was intended to explicitly confirm the availability of contribution rights under CERCLA.<sup>57</sup> When discussing proposed CERCLA § 113, the House Energy and Commerce Committee report submitted by Congressman Dingell states:

It has been held that, when joint and several liability is imposed under section 106 or 107 of the Act, a concomitant right of contribution exists under CERCLA . . . . Other courts have recognized that a right to contribution exists without squarely addressing the issue . . . . This section clarifies and confirms the right of a person held jointly and severally liable under CERCLA to seek contribution from other potentially liable parties, when the person believes that it has assumed a share of the cleanup or cost that may be greater than its equitable share under the circumstances.<sup>58</sup>

Congress believed that in making contribution rights explicit in the statute, and thus ensuring that the costs of cleanup were allocated equitably, private parties would be encouraged to voluntarily clean up hazardous waste sites. “Private parties may be more willing to assume the financial responsibility for cleanup if they are assured that they can seek contribution from other responsible parties.”<sup>59</sup> The Supreme Court decision in *Aviall* appears to have flipped Congressional intent on its head and, in fact, may discourage private parties to voluntarily clean up hazardous waste.<sup>60</sup>

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<sup>57</sup> See Gary D. Centola, *Contribution Claims Under CERCLA in the Absence of a Civil Action*, 11-21 MEALEY’S EMERG. TOXIC TORTS 16,17 (2003).

<sup>58</sup> H.R. REP. NO. 253, 99<sup>th</sup> Cong., 1<sup>st</sup> Sess., pt.1, at 79 (1985).

<sup>59</sup> *Id.* at 80.

<sup>60</sup> See *infra* section IV.A.

## 2. Reimbursement: Amendment of Section 106

Congress also amended CERCLA section 106 to allow parties to seek reimbursement for response costs if they were, in fact, not a liable party under section 107.<sup>61</sup> Section 106(b)(2)(A) states in part: “Any person who receives and complies with the terms of any order issued under subsection (a) of this section may . . . petition the President for reimbursement from the Fund for the reasonable costs of such action, plus interest.”<sup>62</sup> Section 106(b)(2)(C) requires an innocent party to “establish by a preponderance of the evidence that it is not liable for response costs under section [107] . . . and that costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order.”<sup>63</sup>

This amendment of section 106 to include reimbursement appears to further evidence Congressional intent to mitigate the harshness of CERCLA’s strict, joint and several, and retroactive liability through ensuring parties did not pay more than their fair share of the cleanup. For parties who were, in fact, not liable for any part of the disposal, this amendment of section 106 allows them to recover all of their response costs, because paying for any amount of the cleanup would be more than their fair share. Of course, this amendment did not help those innocent parties who were already in the midst of cleaning up a hazardous waste site when SARA was enacted.<sup>64</sup>

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<sup>61</sup> SARA, 100 Stat. at 1628.

<sup>62</sup> CERCLA § 106(b)(2)(A), 42 U.S.C. § 9606(b)(2)(A).

<sup>63</sup> 42 U.S.C. § 9606(b)(2)(C).

<sup>64</sup> See *Bethlehem Steel Corp. v. Bush*, 736 F. Supp. 945, 950-52 (N.D. Ind. 1989); *Wagner Seed Co., Inc. v. Bush*, 709 F. Supp. 249 (D.D.C. 1989), *judgment aff’d*, 946 F.2d 918 (D.C. Cir. 1991).

### **3. Contribution: Section 113, 42 U.S.C. § 9613(f)**

SARA memorialized contribution rights in section 113. Section 113(f) is the key provision and states in relevant part:

Any person may seek contribution from any other person who is liable or potentially liable under section 107(a), during or following any civil action under section 106 or under section 107(a) . . . . In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 106 or section 107.<sup>65</sup>

The apparent conflict between the first sentence containing the phrase “during or following any civil action” and the last sentence containing the phrase “in the absence of a civil action” gave rise to the issue of whether a contribution action is available for a party who voluntarily cleans up a hazardous waste site.<sup>66</sup>

Arguably, these two sentences do little more than clarify that a right of contribution exists when response costs have been incurred by a private party during and following a civil action by the federal government, and confuse by seeming to suggest that a right to contribution may exist even when no federal civil action has yet been taken by the federal government.

#### **a. “During or Following any Civil Action”**

The plain language of § 113(f)(1), makes it clear that contribution rights are available for PRPs against any other PRPs during or following any civil action taken by

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<sup>65</sup> SARA, 100 Stat. 1647.

<sup>66</sup> CERCLA § 113(f), 42 U.S.C. § 9613(f).

the federal government under § 106.<sup>67</sup> The question surrounding the *Aviall* decision is whether this phrase limits the right of contribution to situations where the federal government has taken, or is taking, federal action against a PRP under CERCLA.<sup>68</sup> There were some courts pre-*Aviall* ruling that no contribution actions may be brought under § 113(f) before a § 106 or § 107(a) action had been initiated by the federal government.<sup>69</sup>

**b. “In the Absence of a Civil Action”**

The confusion which sparked this controversy is contained in the very last sentence of § 113(f)(1). In stating that “[n]othing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 106 or section 107,”<sup>70</sup> Congress sent mixed signals whether contribution rights should be available to someone who voluntarily cleans up a site without an administrative order or federal suit initiated by the federal government against them. It has been argued that this sentence “is intended as a ‘savings clause’ to establish the right to a contribution action even in the absence of a previously commenced § 106 or § 107 (a) action.”<sup>71</sup> It has also been argued that the use of the word “may” instead of “shall” or “may only” in the first sentence implies that the requirement that a contribution action be

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<sup>67</sup> 42 U.S.C. § 9613(f)(1).

<sup>68</sup> *Cooper Industries, Inc.*, 125 S. Ct. 577 (2004).

<sup>69</sup> See *E.I. DuPont De Nemours & Co. v. United States*, 297 F. Supp. 2d 740, 749 (D.N.J. 2003) (holding that “a contribution action requires (at least) a prior or ongoing lawsuit”); *Marathon Oil Co. v. Texas City Terminal Railway Co.*, 172 F. Supp. 2d 897 (S.D. Tex. 2001) (granting motion to dismiss plaintiff’s § 113 claim because plaintiffs did not have an administrative order or cost recovery action pending or adjudged against them).

<sup>70</sup> 42 U.S.C. § 9613(f)(1).

<sup>71</sup> *Pfohl Brothers Landfill Site Steering Committee v. Allied Waste Systems, Inc.*, 255 F. Supp. 2d 134, 149 (W.D.N.Y. 2003). See also *City of Waukesha v. Viacom, Inc.*, 221 F. Supp. 2d 975, 977-78 (E.D. Wis. 2002).

brought during or following a civil action should be read permissively and not exclusively.<sup>72</sup> This confusion sets the stage for the issue before the court in *Aviall*.<sup>73</sup>

### **c. Equitable Allocation**

One thing that is clear regarding contribution actions is that when they are available to a PRP, “the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.”<sup>74</sup> In an amendment to a rejected House Superfund Bill, then-Congressman Al Gore proposed specific factors to be used in allocating response costs between PRPs.<sup>75</sup> The “Gore Factors” are:

(1) the ability of the parties to demonstrate that their contribution to a discharge, release or disposal of a hazardous waste can be distinguished; (2) the amount of the hazardous waste involved; (3) the degree of toxicity of the hazardous waste involved; (4) the degree of involvement by the parties in the generation, transport, treatment, storage or disposal of the hazardous waste; (5) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and (6) the degree of cooperation by the parties with the Federal, State or local officials to prevent harm to public health or the environment.<sup>76</sup>

Although the bill which contained this proposed amendment was never passed by the House or Senate, many courts look to these Gore factors as appropriate equitable

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<sup>72</sup> *Pfohl Brothers*, 255 F. Supp. 2d at 153. See also *Coastline Terminals of Connecticut, Inc. v. USX Corp.*, 156 F. Supp. 2d 203, 208 (D. Conn. 2001).

<sup>73</sup> *Cooper Industries, Inc.*, 125 S. Ct. 577 (2004).

<sup>74</sup> 42 U.S.C. § 9613(f)(1).

<sup>75</sup> 126 CONG. REC. 26,336 (1980).

<sup>76</sup> *Centerior Service Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 354 (6<sup>th</sup> Cir. 1998).



factors to use in allocating response costs between PRPs in contribution actions.<sup>77</sup>

However, it is not mandatory for courts to follow the Gore factors; nor are the Gore factors the exclusive considerations to allocate liability when they are used.<sup>78</sup>

There is a three-year statute of limitations for any contribution action.<sup>79</sup> The running of the three-year clock is triggered by the entry of a judgment against the party, an administrative order issued to the party, or a judicially approved settlement is entered against the party.<sup>80</sup>

#### **4. Federal Facilities: 42 U.S.C. § 9620**

Finally, so there was no confusion surrounding whether federal agencies should be held to the same standard as private parties, Congress added section 120(a) mandating federal compliance with CERCLA.<sup>81</sup> In other words, § 120(a) is a waiver of sovereign

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<sup>77</sup> See *Kalamazoo River Study Group v. Menasha Corp.*, 228 F.3d 648, 653 (6<sup>th</sup> Cir. 2000); *United States v. Hercules, Inc.*, 247 F.3d 706, 718 (8<sup>th</sup> Cir. 2001) (recognizing that “courts generally take into account the so-called ‘Gore factors’ in making an equitable allocation”); *United States v. Colorado & Eastern R.R. Co.*, 50 F.3d 1530, 1536 n. 5 (10<sup>th</sup> Cir. 1995).

<sup>78</sup> See *Western Properties Service Corp. v. Shell Oil Co.*, 358 F.3d 678 (9<sup>th</sup> Cir. 2004) (holding court is not bound by or limited to any predetermined list of factors); *Boeing Co. v. Cascade Corp.*, 207 F.3d 1177 (9<sup>th</sup> Cir. 2000) (holding district courts have discretion to choose what factors to consider and will only be reversed for abuse of discretion in selecting factors or for clear error in allocating according to those factors); *Weyerhaeuser Co. v. Koppers Co.*, 771 F. Supp. 1420 (D. Md. 1991) (considering the benefits received by the parties from activities responsible for the release of hazardous waste in equitably allocating liability).

<sup>79</sup> 42 U.S.C. § 9613(g)(3).

<sup>80</sup> *Id.*

<sup>81</sup> CERCLA § 120(a), 42 U.S.C. § 9620(a). See CERCLA § 101(21), 42 U.S.C. § 9601(21) (defining a “person” to include the United States Government); See also Kenneth Michael Theurer, *Sharing the Burden: Allocating the Risk of CERCLA Cleanup Costs*, 50 A.F.L. REV. 65, 81-82 (2001) (for a more in-depth analysis of the federal government’s obligation to comply with CERCLA).

immunity of the United States for CERCLA actions.<sup>82</sup>

“CERCLA’s waiver of sovereign immunity is coextensive with the scope of liability imposed by 42 U.S.C. § 9607. If § 9607 provides for liability, then § 9620(a)(1) waives sovereign immunity to that liability.”<sup>83</sup> Thus, even though the federal government has waived liability for CERCLA actions, a plaintiff must still prove that the government meets the requirements of a PRP under § 107(a).<sup>84</sup> “[E]stablishing the United States liability under CERCLA § 107 is a challenge. The status of the United States as an ‘owner, operator, or arranger’ based on a contractual relationship seldom presents a clear issue.”<sup>85</sup>

Section 120 requires that federal agency compliance be both substantive and procedural to the same extent as a private party’s compliance with CERCLA.<sup>86</sup> Thus, it follows logically that all CERCLA requirements for privately owned facilities at which hazardous substances are located also apply to facilities owned or operated by the federal government.<sup>87</sup>

### **III. *Cooper Industries, Inc. v. Aviall Services, Inc.***

Now, with a more thorough understanding of the genesis and history of contribution actions, it is time to focus on the case that has arguably turned Congressional

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<sup>82</sup> *United States v. Shell Oil Co.*, 294 F.3d 1045, 1048, 1052-53 (9<sup>th</sup> Cir. 2002) (holding that § 120’s waiver of sovereign immunity is not limited to situations in which the government is acting as a nongovernmental entity).

<sup>83</sup> *Shell Oil Co.*, 294 F.3d at 1053.

<sup>84</sup> See Patrick E. Tolan Jr., *Environmental Liability Under Public Law 85-804: Keeping the Ordinary Out of Extraordinary Contractual Relief*, 32 PUB. CONT. L.J. 215, 231 (2003); Kenneth Michael Theurer, *supra* note 81, at 82.

<sup>85</sup> Kenneth Michael Theurer, *supra* note 81, at 83.

<sup>86</sup> 42 U.S.C. § 9620(a)(1).

<sup>87</sup> 42 U.S.C. § 9620(a)(2).

intent, what little there is that can be discerned regarding CERCLA, on its head—*Cooper Industries v. Aviall*.<sup>88</sup> Subsection A details the factual background of the case.

Subsection B analyzes the district court's decision. Subsections C and D cover the Fifth Circuit's handling of the case. Subsection E wraps up this section with a detailed look at the arguments before the Supreme Court.

### **A. Factual Background**

Aviall Services, Inc. (hereinafter Aviall) is the key business unit of Aviall, Inc, a worldwide distributor of commercial and general aftermarket aviation parts.<sup>89</sup> Aviall distributes new aviation parts, components and supplies and provides aftermarket services to government aircraft operators (military and non-military), commercial airline companies and general aviation customers.<sup>90</sup> Aviall's headquarters are in Dallas, Texas, at the Dallas/Fort Worth Airport.<sup>91</sup>

Cooper Industries, Inc, (hereinafter Cooper) is a worldwide manufacturer of electrical products, tools and hardware, and metal support products. Cooper's electrical products include "electrical and circuit protection devices, residential and industrial lighting, and electrical power and distribution products for use by utility companies."<sup>92</sup>

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<sup>88</sup> *Cooper Industries, Inc.*, 125 S. Ct. 577 (2004).

<sup>89</sup> Yahoo! – Aviall Services, Inc. Company Profile, available at <http://biz.yahoo.com/ic/122/122883.html>.

<sup>90</sup> Aviall Services, Inc. – Fact Sheet – Hoover's Online, available at [http://www.hoovers.com/aviall-services/--ID\\_122883--/free-co-factsheet.xhtml](http://www.hoovers.com/aviall-services/--ID_122883--/free-co-factsheet.xhtml).

<sup>91</sup> See Aviall Services, Inc.'s website, available at <http://www.aviall.com> for more information about Aviall Services, Inc. and its parent company Aviall, Inc.

<sup>92</sup> Cooper Industries, Ltd. – Fact Sheet – Hoover's Online, available at [http://www.hoovers.com/free/co/factsheet.xhtml?COID=10405&cm\\_ven=PAID&cm\\_cat=OVR&cm\\_pla=CO4&cm\\_ite=cooper\\_industry](http://www.hoovers.com/free/co/factsheet.xhtml?COID=10405&cm_ven=PAID&cm_cat=OVR&cm_pla=CO4&cm_ite=cooper_industry).

Cooper's headquarters are in Houston, Texas.<sup>93</sup>

In the 1970s, Cooper started an aircraft maintenance business, operating four aircraft engine maintenance facilities in the Dallas, Texas, area.<sup>94</sup> In the course of operating this business, Cooper polluted the facilities with hazardous substances including airplane fuel, chemical solvents, trichloroethylene (TCE), chromium and petroleum.<sup>95</sup> The pollution mainly occurred from seepage into the soil and groundwater through underground storage tank leaks and spills.<sup>96</sup> Cooper operated its aircraft maintenance facilities until 1981, when it sold its business, including the contaminated facilities, to Aviall in an asset purchase agreement.<sup>97</sup>

Aviall admits that while running aircraft engine maintenance facilities at the sites, it continued to pollute the sites with hazardous substances similar to those disposed of by Cooper.<sup>98</sup> This pollution continued for several years until Aviall discovered the soil and groundwater at each site were extensively contaminated<sup>99</sup> and reported the contamination to the Texas Natural Resource Conservation Commission (TNRCC).<sup>100</sup> The TNRCC

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<sup>93</sup> See Cooper Industries, Inc.'s website, available at <http://www.cooperindustries.com> for more information about the company and its history.

<sup>94</sup> See David Ivanovich, *Supreme Court's Decision Changes Rules on Toxic Waste Cleanups*, Environmental News Network (2004), available at <http://www.enn.com/biz.html?id=104>; Cooper Industries – Wikipedia, the free encyclopedia, available at [http://en.wikipedia.org/wiki/Cooper\\_Industries](http://en.wikipedia.org/wiki/Cooper_Industries).

<sup>95</sup> *Aviall Services, Inc. v. Cooper Industries, Inc.*, 263 F.3d 134, 136 (5<sup>th</sup> Cir. 2001); Society of Environmental Journalists: TipSheet Item – *Supreme Court: Who Gets to Sue Under Superfund?* (2004), available at [http://notes.sej.org/sej/tipsheet.nsf/0/f46379cb4f36\\_da0786256f48006fbd80?OpenDocument](http://notes.sej.org/sej/tipsheet.nsf/0/f46379cb4f36_da0786256f48006fbd80?OpenDocument).

<sup>96</sup> *Aviall Services, Inc.*, 263 F.3d at 136.

<sup>97</sup> *Aviall Services, Inc. v. Cooper Industries, Inc.*, 2000 U.S. Dist. LEXIS 520, \*3 (N.D. Tex. Jan. 13, 2000).

<sup>98</sup> *Aviall Services, Inc.*, 263 F.3d at 136.

<sup>99</sup> *Aviall Services, Inc.*, 2000 U.S. Dist. LEXIS 520 at \*3.

<sup>100</sup> *Aviall Services, Inc.*, 263 F.3d at 136.

responded by sending numerous letters to Aviall notifying the company that it was in violation of state environmental laws.<sup>101</sup>

In 1984, Aviall voluntarily began cleaning up the sites, a process that continued for several years and cost Aviall millions of dollars.<sup>102</sup> Before Aviall's cleanup began, neither the TNRCC nor the Environmental Protection Agency (EPA) took any official action to force Aviall to clean up the sites,<sup>103</sup> although the fourth letter from the TNRCC "promised enforcement action if Aviall failed to pursue one of two suggested remediation options."<sup>104</sup> Further, the EPA never designated Aviall's facilities as contaminated sites.<sup>105</sup> Aviall eventually sold the facilities, but retained contractual responsibility for environmental remediation of the sites.<sup>106</sup>

Aviall first contacted Cooper in 1995 seeking reimbursement for its share of the cleanup costs.<sup>107</sup> After two years of unsuccessful attempts to obtain reimbursement from Cooper, Aviall sued Cooper in the United States District Court for the Northern District of Texas, Dallas division, seeking contribution relief based on CERCLA § 113(f)(1).<sup>108</sup>

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<sup>101</sup> *Aviall Services, Inc.*, 263 F.3d at 136.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*; Lieutenant Colonel David Harney, *Environmental Law Division Notes: Fifth Circuit Reverses Aviall – Broadens Superfund Contribution Right*, 2003 ARMY LAW. 18, \*18 (2003); Ira M. Gottlieb, *Landmark U.S. Supreme Court Superfund Decision Will Affect Insurance Claims: But the Question is How and How Much?*, 13-19 MEALEY'S EMERG. TOXIC TORTS 15 (2005).

<sup>104</sup> *Aviall Services, Inc. v. Cooper Industries, Inc.*, 312 F.3d 677, 679 (5<sup>th</sup> Cir. 2002) (en banc).

<sup>105</sup> *Aviall Services, Inc.*, 263 F.3d at 136.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Aviall Services, Inc.*, 2000 U.S. Dist. LEXIS 520 at \*3.

## B. District Court Decision

Aviall sued Cooper in Federal District Court to recover costs it had already incurred and for anticipatory costs it had yet to incur in the cleanup of the sites.<sup>109</sup> Originally, Aviall's lawsuit contained separate causes of action under CERCLA § 107(a), which allows cost recovery from PRPs, and CERCLA § 113(f)(1).<sup>110</sup> In amending the complaint, Aviall dropped the independent CERCLA § 107(a) claim and asserted a "so-called 'combined' § 107(a) and § 113(f)(1) claim."<sup>111</sup> Aviall's amended complaint sought relief based on theories of:

- (1) breach of contract, (2) breach of express warranty,
- (3) contractual indemnification, (4) declaratory judgment,
- (5) contribution under CERCLA § 113(f)(1), (6) contribution under § 361.344(a) of the Texas Solid Waste Disposal Act, Tex. Health & Safety Code Ann. § 361.344(a) (West 1992 & Supp. 2000), (7) contribution under § 26.3513(j) of the Texas Water Code, Tex. Water Code Ann. § 26.3513(j) (West 1998 & Supp. 2000), (8) quantum meruit, and (9) attorney's fees.<sup>112</sup>

Considering that the right of contribution issue in this case is the seminal issue that was brought before the Supreme Court and their decision will have a significant and far-reaching legal impact beyond the parties in this case, one may find it interesting to note that Aviall itself characterized the suit as primarily a breach of contract case with the CERCLA § 113(f)(1) contribution claim pleaded in the alternative.<sup>113</sup> Cooper

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<sup>109</sup> *Aviall Services, Inc.*, 2000 U.S. Dist. LEXIS 520 at \*3.

<sup>110</sup> *Aviall Services, Inc.*, 263 F.3d at 136. See *supra*. Section II.A.3 and *infra* Sections IV.B. & VI.A. for a discussion of § 107(a)(4)(B), CERCLA's cost recovery provision.

<sup>111</sup> *Aviall Services, Inc.*, 2000 U.S. Dist. LEXIS 520 at \*7 (relying on § 107 only "to the extent necessary to maintain a viable § 113(f)(1) contribution claim" and "not as an independent cause of action against Cooper.").

<sup>112</sup> *Id.* at \*3, \*4.

<sup>113</sup> See *Aviall Services, Inc.*, 2000 U.S. Dist. LEXIS 520 at \*4, \*5 (N.D. Tex. Jan. 13, 2000) ("Aviall characterizes this lawsuit as 'primarily, but not exclusively, a contract case.' P. Apr. 16, 1999 Mem. at 1").

counterclaimed for contribution under CERCLA § 113(f)(1), as well as for contractual indemnification and breach of contract under Texas state law.<sup>114</sup>

Judge Sidney A. Fitzwater's opinion was written in response to motions for summary judgment by both parties.<sup>115</sup> Cooper argued in its motion for summary judgment that Aviall's CERCLA § 113(f)(1) action should be dismissed because Aviall had not been subjected to a civil action under CERCLA § 106 or § 107(a) and thus failed to satisfy § 113(f)(1)'s "during or following" requirement.<sup>116</sup>

Judge Fitzwater looked to what he saw as the "plain language" of § 113(f)(1),<sup>117</sup> granting Cooper's motion to dismiss Aviall's contribution claim without prejudice.<sup>118</sup> In dismissing the case without prejudice, Judge Fitzwater noted that normally a disposition on the merits of the case would result in a dismissal with prejudice, but in this case "Aviall arguably can bring such a claim against Cooper in the future if Aviall becomes subject to a CERCLA enforcement action that gives rise to a right of contribution."<sup>119</sup>

In casually dismissing the last sentence of CERCLA § 113(f)(1), Judge Fitzwater opined: "This proviso is likely intended to ensure that parties who cannot fulfill the prerequisites of § 113(f)(1) are not precluded from bringing contribution claims that are

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<sup>114</sup> *Aviall Services, Inc.*, 2000 U.S. Dist. LEXIS 520 at \*4.

<sup>115</sup> *Id.*

<sup>116</sup> Wm. Bradford Reynolds & Lisa K. Hsiao, *The Right of Contribution Under CERCLA After Cooper Industries v. Aviall Services*, 18 TUL. ENVTL. L.J. 339 (2005).

<sup>117</sup> "[C]ontribution claims may only be brought 'during or following any civil action under [§ 106] or under [§ 107(a)]'" (emphasis in original).

<sup>118</sup> *Aviall Services, Inc.*, 2000 U.S. Dist. LEXIS 520 at \*8, \*17.

<sup>119</sup> *Id.* at \*13 n.4.

otherwise available, such as under state law.”<sup>120</sup> However, Judge Fitzwater failed to cite any legislative history to support his seemingly matter-of-fact assertions of Congressional intent. In Judge Fitzwater’s defense, CERCLA’s legislative history is quite lacking in helping decipher Congressional intent, but strangely, Judge Fitzwater neglected to mention this lack of legislative history and instead relied on two Illinois cases, neither of which cites any definitive legal authority for their interpretations of CERCLA § 113(f)(1).<sup>121</sup> In fact, while the *Estes* court itself admits CERCLA’s legislative history is sparse, its own ruling is based on the smoke and mirrors of dicta from Seventh Circuit Court of Appeals opinion:

In Rumpke, the only case to address this issue, the Seventh Circuit held that a § 106 or § 107(a) action must be brought against a PRP plaintiff in order for the PRP plaintiff to bring a contribution under § 113(f). The Rumpke court stated: ‘We acknowledge, as other courts have, that this **seems to** provide a disincentive for parties voluntarily to undertake cleanup . . . . This **appears to be** what the statute requires, however.’ The Seventh Circuit was aware it was creating a disincentive for voluntary cleanup but **nevertheless interpreted** the statute to require a § 106 or § 107(a) action to be either ongoing or completed . . . . In **attempting** to give the entire statute effect, the language in Rumpke as well as the Rockwell interpretation **appear** correct.’<sup>122</sup>

While the holdings cited by Judge Fitzwater are indeed consistent with each other and with the Fifth Circuit’s interpretation of CERCLA § 113(f), none of the authorities cited base their interpretations on anything but some apparent internal ability of judges to

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<sup>120</sup> *Aviall Services, Inc.*, 2000 U.S. Dist. LEXIS 520 at \*8.

<sup>121</sup> *Id.* at \*8, \*9 (relying on *Rockwell Int’l Corp. v. IU Int’l Corp.*, 702 F. Supp. 1384 (N.D. Ill. 1988) and *Estes v. Scotsman Group, Inc.*, 16 F. Supp. 2d 983 (C.D. Ill. 1998) (quoting *Rockwell Int’l Corp.*, 702 F. Supp. at 1389).

<sup>122</sup> *Estes*, 16 F. Supp. 2d at 989-990 (emphasis added) (citation omitted). As Judge Weiner noted in his dissent to the 5<sup>th</sup> Circuit panel decision in *Aviall*, “a different district court in the same circuit refused to ‘be guided by the equivocal dicta in Rumpke’ and held that ‘in light of the express language of Section 113(f)(1). . . [a] PRP can bring a section 113 action even when no prior or pending section 106 or 107 civil actions have occurred.’” *Aviall Services, Inc.*, 263 F.3d at 152-153.



know what Congress was thinking, despite the lack of supporting documentation in the Congressional Record.<sup>123</sup>

Having dismissed the only federal cause of action pled in the case, Judge Fitzwater then exercised his judicial discretion in declining to hear Aviall's remaining state law claims under the doctrine of supplemental jurisdiction and dismissed them without prejudice.<sup>124</sup> Judge Fitzwater also dismissed Cooper's counterclaim against Aviall without prejudice.

### **C. Fifth Circuit Panel Decision**

Aviall, naturally displeased with the outcome of the case in district court, appealed the case to the Fifth Circuit arguing that a prior civil action under § 106 or § 107(a) was not required because it voluntarily cleaned up the site or, in the alternative, because it cleaned up "at the behest of a state environmental agency."<sup>125</sup> A divided three-judge panel dismissed Aviall's arguments and affirmed Judge Fitzwater's district court judgment.

In affirming the judgment, the majority first looked to the "text and structure of CERCLA."<sup>126</sup> In analyzing § 113's "plain language," the majority relied on the *Black's Law Dictionary* definition of the word "contribution" and opined that "the commonly accepted definition of contribution requires a tortfeasor to first face judgment before it

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<sup>123</sup> *Aviall Services, Inc.*, 2000 U.S. Dist. LEXIS 520 at \*10, \*11. Judge Fitzwater noted that the 5<sup>th</sup> Circuit Court instead "relied on the Black's Law Dictionary definition of contribution" in attempting to unravel Congressional intent regarding § 113(f) contribution actions.

<sup>124</sup> *Id.* at \*15, \*16.

<sup>125</sup> *Aviall Services, Inc.*, 263 F.3d at 136.

<sup>126</sup> *Id.* at 137.

can seek contribution from other parties.”<sup>127</sup> Next, the majority picked at Aviall’s claim that the word “may” in the statute signified a “non-exclusive” means of contribution.<sup>128</sup> They use the dictionary to support their canons of statutory construction concluding that “[i]t has long been recognized that the word ‘may’ can mean ‘shall’ or ‘must . . . especially in deeds, contracts, and statutes.’”<sup>129</sup>

To end its analysis of the text of the statute, the majority dismissed Aviall’s reliance on the general savings clause in the last sentence of § 113(f)(1), concluding that the proper interpretation of this clause is it “was likely intended to preserve state law-based claims of contribution.”<sup>130</sup> As noted by the author of a Tulane Environmental Law Journal Article, “[a]lthough the court claimed to rely on the plain language of the statute, its decision ultimately hinges on the strategic insertion of two fairly meaningful words into its text.”<sup>131</sup>

If Congress had, in fact, added the words the Court appears to read into the statute, it would have been clear that Congress intended that a prior civil action under § 106 or § 107(a) precede a contribution right under § 113(f)(1). Judge Wiener, in his dissent, went one step further and suggested that adding this language “boldly rewrites the statute by imposing the extra-congressional restriction that the savings clause itself affirmatively

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<sup>127</sup> *Aviall Services, Inc.*, 263 F.3d at 138; See also Andrea Kang, *Aviall Services v. Cooper Industries: The Fifth Circuit’s Decision to Limit the Availability of Contribution Actions Under CERCLA May Discourage Voluntary Cleanups*, 15 TUL ENVTL. L.J. 133, 138 (2001).

<sup>128</sup> *Aviall Services, Inc.*, 263 F.3d at 138.

<sup>129</sup> *Id.* at 139.

<sup>130</sup> *Id.* at 140. See also Andrea Kang, *supra* note 127, at 139.

<sup>131</sup> Andrea Kang, *supra* note 127, at 140 (speaking of the majority’s reading of the word “only” after the word “may” into the first sentence of § 113(f)(1) and the word “state” after the word “action” into the general savings clause in the last sentence of § 113(f)(1)).

rejects” and that it evidenced “yet another judicial trespass on the legislative turf.”<sup>132</sup>

Next, the panel defies logic by finding reinforcement for their interpretation of § 113(f)(1) in CERCLA’s legislative history.<sup>133</sup> This seems akin to finding a needle in a haystack considering the lack of legislative history that is truly helpful or definitive in deciphering congressional intent regarding CERCLA. Not only does the majority find reinforcement for their analysis, but they bafflingly assert that it “overwhelmingly” supports their interpretation.

However, the court’s “overwhelming” support consists of one House of Representatives conference report stating that “a contribution action exists even if a CERCLA action is merely pending,” and the lack of an express statement in the legislative history “that SARA was intended to allow contribution in the absence of either a pending or prior § 106 or § 107(a) action.”<sup>134</sup> It seems like a huge leap for the court to suggest that this support evidences overwhelmingly supports their position. As Judge Wiener was quick to note in his dissent: “[T]he majority fecklessly relies on House and Senate reports that address markedly different, and **ultimately abandoned** versions of what would later become the enacted version of § 113(f)(1).”<sup>135</sup>

Finally, the majority analyzed case law to find support for their decision. Unlike Judge Fitzwater in his district court opinion, the Circuit Court panel was forthright in admitting that “no directly binding case law exists.”<sup>136</sup> Kudos, however, are short-lived

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<sup>132</sup> *Aviall Services, Inc.*, 263 F.3d at 146 (Wiener, J., dissenting).

<sup>133</sup> *Aviall Services, Inc.*, 263 F.3d at 138.

<sup>134</sup> *Id.* at 141. *See also* Andrea Kang, *supra* note 127, at 139.

<sup>135</sup> *Aviall Services, Inc.*, 263 F.3d at 151 (emphasis added) (Wiener, J., dissenting).

<sup>136</sup> *Aviall Services, Inc.*, 263 F.3d at 137.

as the panel turns a blind eye to fact by asserting that they believe “the majority of courts that have addressed this issue agree with our textual analysis.”<sup>137</sup> As Judge Wiener aptly pointed out in his dissent:

[F]ederal courts of appeal (including this one) have permitted § 113(f)(1) contribution suits to go forward in the absence of civil actions under § 106 or § 107(a) . . . . True enough, whether a party may seek contribution under § 113(f)(1) in the absence of a CERCLA action against it was not a contested issue in any of these cases. But albeit tacit, that phenomenon only underscores the common understanding among courts and litigants alike that the plain language of § 113(f)(1) does not require a PRP to wait until it is haled into court to seek contribution under the statute.<sup>138</sup>

Judge Wiener eloquently summarized the solidity of the majority’s claim of vast judicial support for their position, stating it “vanishes like the mist when exposed to the sunshine of objective scrutiny. If one robin does not make a spring, then surely a light dusting of equivocal district court cases and a wisp of dicta from another circuit court does not persuasive authority make.”<sup>139</sup>

#### **D. En Banc Decision**

Disappointed by the panel decision, Aviall petitioned the Fifth Circuit for an en banc rehearing. The Court granted Aviall’s petition<sup>140</sup> “[b]ecause of the importance of this question to the allocation of financial responsibility for CERCLA cleanups.”<sup>141</sup> Ten of the thirteen judges who participated in the en banc decision concurred in the majority

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<sup>137</sup> *Aviall Services, Inc.*, 263 F.3d at 137-38.

<sup>138</sup> *Id.* at 152 (Wiener, J., dissenting).

<sup>139</sup> *Id.* at 155 (Wiener, J., dissenting); *See also* Andrea Kang, *supra* note 127, at 141.

<sup>140</sup> *Aviall Services, Inc. v. Cooper Industries, Inc.*, 278 F.3d 416 (5<sup>th</sup> Cir. Dec. 19, 2001).

<sup>141</sup> *Aviall Services, Inc.*, 312 F.3d at 680.

opinion, which reversed the district court decision.<sup>142</sup> The majority adopted Judge Wiener's interpretation of § 113(f)(1) from his panel dissent and agreed that "the great majority of circuit courts implicitly reject the panel majority's conclusion" that a contribution action under § 113(f)(1) must be preceded by a civil action under § 106 or § 107(a).<sup>143</sup> The three remaining judges dissented in an opinion written by the author of the majority opinion in the preceding panel decision, Judge Garza.<sup>144</sup>

As in the opinions below, the majority opinion began its analysis with the plain language of the statute. Unlike the opinions below, however, this majority opinion was more realistic in approaching its analysis of CERCLA's language. As the Court notes, "[s]tatutory construction begins with the plain language of a statute, but 'plain' does not always mean 'indisputable' or 'pellucid.' Consequently, sound interpretation . . . acknowledges the legislature's general policies so that the interpretation does not become absurd."<sup>145</sup> Further evidence of the majority's understanding that the "plain" language of CERCLA § 113(f)(1) is, in fact, not very plain at all, appears in the very next sentence. "Reasonable minds can differ over the interpretation of section 113(f)(1), because its syntax is confused, its grammar inexact and its relationship to other CERCLA provisions ambiguous. Using the above tools, however, we adopt what we consider the most reasonable interpretation of the provision."<sup>146</sup> The majority's reasonable interpretation was that "[s]ection 113(f)(1) authorizes suits against PRPs in both its first and last

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<sup>142</sup> *Aviall Services, Inc.*, 312 F.3d at 678; John M. Hyson, *The Aviall Case: Will the Supreme Court Deny Recovery Under CERCLA to PRPs Who Voluntarily Incur Response Costs?*, 34 ELR 10824, 10825 (2004).

<sup>143</sup> *Aviall Services, Inc.*, 312 F.3d at 680.

<sup>144</sup> *Id.* at 678; John M. Hyson, *supra* note 142, at 10825, n.16.

<sup>145</sup> *Aviall Services, Inc.*, 312 F.3d at 680.

<sup>146</sup> *Aviall Services, Inc.*, 312 F.3d at 680-81.

sentence which states that ‘nothing’ in the section shall ‘diminish’ any person’s right to bring a contribution action in the absence of a section 106 or section 107(a) action.”<sup>147</sup>

In arriving at their interpretation, the Court first delved into the background of CERCLA generally and § 113(f) specifically. The Court noted that the “twin purposes” of CERCLA are “to promote prompt and effective cleanup of hazardous waste sites and **the sharing of financial responsibility among the parties whose actions created the hazards.**”<sup>148</sup> (emphasis added). The Court also noted that CERCLA, as enacted, “contained no explicit recovery through contribution,” but observed that “[f]ederal courts soon began articulating a federal common law right of contribution to resolve claims among PRPs . . . even though the plaintiff had not been sued under § 106 or § 107.”<sup>149</sup> The majority continued to trace CERCLA’s history by pointing to the Supreme Court’s express acknowledgement of the development of contribution rights in the federal common law in *Key Tronic Corp. v. United States*,<sup>150</sup> where the Court held that § 107 “impliedly authorizes” a cause of action for contribution.<sup>151</sup>

The Court wrapped up this first section of its opinion with “a brief and cautious review of the legislative history of § 113(f)(1).”<sup>152</sup> Unlike the previous decisions in this case, the majority realized the legislative history for CERCLA was “notorious for

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<sup>147</sup> *Aviall Services, Inc.*, 312 F.3d at 681. See also John M. Hyson, *supra* note 142, at 10825.

<sup>148</sup> *Id.* at 681.

<sup>149</sup> *Id.* at 682. See also John M. Hyson, *supra* note 142, at 10825-26.

<sup>150</sup> *Key Tronic Corp.*, 511 U.S. at 816.

<sup>151</sup> *Aviall Services, Inc.*, 312 F.3d at 682.

<sup>152</sup> *Aviall Services, Inc.*, 312 F.3d at 683-84.

vaguely drafted provisions” and was “inconclusive, if not contradictory.”<sup>153</sup> While it was evident to the majority that the legislative history of CERCLA was a poor guide to interpretation of § 113(f)(1), the majority did note that “it would seem odd that a legislature concerned with clarifying the right to contribution among PRPs and with facilitating the courts’ development of federal common law apportionment principles would have rather arbitrarily cut back the then-prevailing standard of contribution.”<sup>154</sup> The Court concluded that “[i]n no event does the [legislative] history ‘overwhelmingly support’ the panel majority’s narrow view of the statute.”<sup>155</sup>

The next section of the majority opinion focused on the statutory text of § 113(f)(1) itself. The majority believed that the claim for contribution described in the first sentence of § 113(f)(1) was not meant to be read to exclusively allow contribution actions “during or following” a civil action under § 106 or § 107(a).<sup>156</sup>

‘Only,’ . . . is the word choice of the dissent, not of Congress, which characterizes the actions permissively. . . . Elsewhere in CERCLA, Congress used ‘only’ many times, signifying its intent to narrow, exclude or define provisions. Had Congress similarly intended to make contribution actions available ‘only’ after the referenced CERCLA lawsuits have been brought, it could have done so.<sup>157</sup>

The majority concludes its textual analysis by considering the “inter-relationship

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<sup>153</sup> *Aviall Services, Inc.*, 312 F.3d at 684.

<sup>154</sup> *Id.* See also Jeffrey M. Gaba, *Survey Article: Environmental Law*, 35 TEX. TECH L. REV. 831, 834 (2004).

<sup>155</sup> *Aviall Services, Inc.*, 312 F.3d at 685.

<sup>156</sup> *Id.* at 686.

<sup>157</sup> *Id.* (footnote omitted).

of the first and last sentences of § 113(f)(1).”<sup>158</sup> The majority found these sentences “logically complementary” and noted that the “first and last sentences of § 113(f)(1) combine to afford the maximum latitude to parties involved in the complex and costly business of hazardous cleanups.”<sup>159</sup>

In the next section of its opinion, the majority turned to an analysis of case law. The majority was quick to note that there was a lack of direct precedent regarding the issue before the court.<sup>160</sup> The majority believed that the lack of decisions explicitly parsing the language of § 113(f)(1) weighed “more in favor of than against [its] non-restrictive view of the provision.”<sup>161</sup> As the majority opined, the dissent’s reading of the statute would have thrown “into uncertainty more than two decades of CERCLA practice, if the pre-CERCLA common law of contribution is included.”<sup>162</sup> While “[s]uch a result may not be inconceivable, . . . it should place a heavy burden on the dissent to explain how its interpretation is justified under a ‘plain meaning’ reading of the statute.”<sup>163</sup>

For the last section of its opinion, the majority analyzed policy considerations. The majority believed that “[t]he dissent’s reading of § 113(f)(1) would . . . create substantial obstacles to achieving the purposes of CERCLA” by discouraging voluntary clean ups and diminishing the incentives for voluntary reporting hazardous waste

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<sup>158</sup> *Aviall Services, Inc.*, 312 F.3d at 687.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 688 (comparing the lack of direct precedent to “the dog that didn’t bark”).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 689.

<sup>163</sup> *Id.*



contamination to state environmental agencies.<sup>164</sup>

The dissent, not surprisingly like the majority panel decision, found that “the plain language and statutory structure of CERCLA’s contribution provisions demonstrate that the contribution remedy in § 113(f)(1) requires a prior or pending § 106 or § 107 action.”<sup>165</sup> Judge Garza added an additional argument in support of the dissent’s position—the differences between the statute of limitations for contribution actions and the statute of limitations for cost-recovery actions.<sup>166</sup> Judge Garza’s dissent pointed out that a contribution claim must be brought within three years of a judgment under § 106 or § 107, while the statute of limitations for a cost-recovery claim under § 107(a)(4)(B) begins with the date of completion or initiation of cleanup activity.<sup>167</sup> This argument seems weak in light of the fact that when previously presented with the issue of what statute of limitations applies to a cost-recovery claim in the absence of a prior judgment, the Court stated that use of the statute of limitations applicable to § 107(a)(4)(B) claims was proper.<sup>168</sup>

Although it reversed the district court judgment, the Court remanded the case to the district court to address two remaining issues. The first issue was whether Aviall gave timely notice of its CERCLA action to the EPA and the Attorney General. The second issue was whether Aviall complied with the National Oil and Hazardous

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<sup>164</sup> *Aviall Services, Inc.*, 312 F.3d at 689-90. See also John M. Hyson, *supra* note 142, at 10826-27.

<sup>165</sup> *Aviall Services, Inc.*, 312 F.3d at 687.

<sup>166</sup> *Id.* at 694 (Garza, J., dissenting).

<sup>167</sup> *Id.* See also Jeffrey M. Gaba, *supra* note 154 at 836 n.47.

<sup>168</sup> Jeffrey M. Gaba, *supra* note 154, at 836 n.47 (citing *Geraghty & Miller, Inc. v. Conoco, Inc.*, 234 F.3d 917 (5<sup>th</sup> Cir. 2000)).

Substances Pollution Plan (NCP) when it failed to provide an adequate opportunity for public participation in the cleanup process.<sup>169</sup>

### **E. Supreme Court Arguments**

On February 12, 2003, before the district court could address the issues given to it upon remand by the Fifth Circuit, Cooper petitioned the Supreme Court for a writ of certiorari.<sup>170</sup> The Supreme Court granted certiorari on January 9, 2004, and heard oral arguments on October 6, 2004.<sup>171</sup> The following subsections detail the arguments presented by both sides, as well as the arguments presented in the amicus curiae briefs, which are helpful in making a thorough analysis of the right to contribution issue from each side's perspective and their respective interests in the outcome of the case.

#### **1. Brief for the Petitioner, Cooper Industries, Inc.**

The issue as presented by Cooper in its brief was “whether a party which has voluntarily incurred costs to clean up hazardous waste sites may bring a federal cause of action for contribution under Section 113(f)(1) in the absence of a CERCLA suit to establish the underlying liability.”<sup>172</sup> Cooper argued that “[w]hen read together, both the text and context of Section 113(f)(1)’s four sentences compel the conclusion that CERCLA provides only a limited right of contribution which is available exclusively to

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<sup>169</sup> *Aviall Services, Inc.*, 312 F.3d at 691.

<sup>170</sup> *Aviall Services, Inc.*, 312 F.3d 677, *petition for cert. filed*, *Cooper Industries, Inc. v. Aviall Services, Inc.*, 2003 WL 23015035 (2003).

<sup>171</sup> *Aviall Services, Inc.*, 312 F.3d 677, *cert. granted*, *Cooper Industries, Inc. v. Aviall Services, Inc.*, 540 U.S. 1099 (2004); *Cooper Industries, Inc. v. Aviall Services, Inc.*, 73 USLW 3246 (U.S. Oct. 6, 2004).

<sup>172</sup> Brief for the Petitioner at 5, *Cooper Industries, Inc. v. Aviall Services, Inc.*, 125 S. Ct. 577 (2004) (No. 02-1192).

litigants who have been subject to a Section 106 or 107(a) civil action.”<sup>173</sup>

To get to its conclusion, Cooper first turned to CERCLA’s background. Cooper noted the pre-SARA split between numerous district courts that found an implied right of contribution and two Supreme Court decisions declining “to read implied contribution rights into a statute that did not expressly provide for such rights.”<sup>174</sup> It seems ironic that Cooper would note the Supreme Court previously refused to read rights into a statute that were not expressly provided for, yet here Cooper was asking the Supreme Court to limit rights that were not expressly limited by the statute. In fact, as reasoned by the Fifth Circuit below, the savings clause contained in the last sentence of § 113(f)(1), expressly preserves those rights.<sup>175</sup>

Cooper next focused on CERCLA’s plain language to support its reading of § 113(f)(1). While Cooper admitted that both sides can point to the contemporary definition of the word ‘may’ to support their respective reading of the word in the first sentence of § 113(f)(1), Cooper argued that “the clear implication of a congressional directive that one “may” take an action upon the occurrence of a specific condition precedent is that, in the absence of that condition occurring, one may not.”<sup>176</sup> In doing so, Cooper failed to follow the “traditional canons of statutory construction” it touted a paragraph earlier by reading the first sentence apart from the last sentence of the section

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<sup>173</sup> Brief for the Petitioner at 5.

<sup>174</sup> *Id.* at 10 (citing *Texas Industries, Inc.*, 451 U.S. at 639-40 and *Northwest Airlines, Inc. v. Transportation Workers Union of America*, 451 U.S. 77, 91-95 (1981)).

<sup>175</sup> 42 U.S.C. § 9613(f)(1); *Aviall Services, Inc.*, 312 F.3d at 690.

<sup>176</sup> Brief for the Petitioner at 14.

in arriving at its conclusion instead of reading the four sentences of § 113(f)(1) together.<sup>177</sup>

Then, Cooper glossed over the savings clause contained in the last sentence of § 113(f)(1) by regarding the observations of the dissent below as if they had been inscribed on the tablets Moses brought down from Mt. Sinai.<sup>178</sup> “The dissent below observed that this language—which by its very nature is intended only to impact other contribution schemes—was inserted to save all state law actions for contribution. **Undoubtedly, this is true.**”<sup>179</sup> This argument failed to persuade Judge Weiner when the case was before the Fifth Circuit Panel,<sup>180</sup> and Cooper, in my opinion, added no authority to make the argument any more persuasive this time.

Cooper’s more compelling argument regarding the statute’s plain language was that the Supreme Court had “specifically admonished that a savings clause should not be read to override or negate a statute’s enabling clause.”<sup>181</sup> However, Cooper again appeared to contradict itself, saying “both clauses, if neither is overread, fit well with one another.”<sup>182</sup> It seemed that Cooper wanted to have it both ways. Either the savings clause overrode/negated the enabling clause or it did not. Perhaps Cooper felt its argument would be more persuasive before the Supreme Court if it were able to suggest that Aviall still had a potential remedy under state law.

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<sup>177</sup> Brief for the Petitioner at 13-14.

<sup>178</sup> *Exodus* 34:29.

<sup>179</sup> Brief for the Petitioner at 17-1 (emphasis added) (footnote omitted) (citation omitted).

<sup>180</sup> *See supra*. Section III.C.

<sup>181</sup> Brief for the Petitioner at 21.

<sup>182</sup> *Id.*

Cooper then turned to an analysis of the statute's essential purpose to support its position for a limited right of action under § 113(f)(1).<sup>183</sup> In suggesting that the purpose of § 113(f)(1) was to limit contribution rights to situations where a PRP has been subject to, or is the midst of, a § 106 or § 107 civil action, Cooper boldly asserted that “[a]t the time of SARA’s enactment, every case finding an implied right of contribution arose in the context of a pending or concluded Section 106 or Section 107(a) civil action.”<sup>184</sup> Cooper causally dismissed the pre-SARA federal courts’ decisions allowing contribution actions even when a plaintiff had not been sued under § 106 or § 107 by asserting these cases involved “cost-recovery” claims and not “contribution” claims and, as such, were “not saved by the fourth sentence of § 113(f)(1).”<sup>185</sup>

Next, Cooper claimed that the overall structure and scheme of CERCLA support a limited right of action under § 113(f)(1).<sup>186</sup> Specifically, Cooper pointed to the applicable statute of limitations period for contribution actions and the CERCLA’s overall settlement scheme.<sup>187</sup> Cooper argued that because the statute of limitations for contribution action is triggered by “the date of a judgment or settlement of a Section 106 or Section 107(a) action” and is silent regarding a trigger in the absence of an underlying civil action or settlement under § 106 or § 107(a), the “omission further suggests that Congress intended to create only the conditioned right of contribution set forth in Section

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<sup>183</sup> Brief for the Petitioner at 22.

<sup>184</sup> *Id.* at 23.

<sup>185</sup> *Id.* at 24 n.18. *See also* John M. Hyson, *supra* note 12, at 10829.

<sup>186</sup> Brief for the Petitioner at 31.

<sup>187</sup> *Id.* at 31-35.

113(f)(1)'s enabling clause and the contribution right included in Section 113(f)(3)(B) for persons entering into approved settlements with government authorities.”<sup>188</sup>

This was another prime example of contradiction by Cooper. Cooper wanted the Court to read in words that were supposedly omitted in the last sentence of § 113(f)(1) in order to interpret it to preserve contribution claims under state law. However, when the opposition wanted to substitute a statute of limitations period that was omitted from the statute, Cooper argued the substitution constituted a violation of the “expression unius principle” requiring a “conclusion that excluded language was omitted intentionally.”<sup>189</sup>

Regarding CERCLA's settlement scheme, Cooper argued that “[a]llowing Section 113(f)(1) contribution actions in the absence of a pending or concluded civil action under Sections 106 or 107(a) also undermines Section 113(f)'s ‘comprehensive scheme’ to encourage early settlement of Section 106 or 107(a) suits.”<sup>190</sup> In making this argument, Cooper dreamt up an unlikely hypothetical situation where a defendant who had been found liable for a proportion of cleanup costs pursuant to § 113(f)(1)'s savings clause could still be held jointly and severally liable for all clean-up costs in a subsequent suit by the government.<sup>191</sup> Even if this hypothetical were realistic, it does not seem to correlate to a party's willingness to settle with the government in a suit under § 113(f)(1)'s enabling clause.

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<sup>188</sup> Brief for the Petitioner at 31-32.

<sup>189</sup> *Id.* at 32 (citing NORMAN J. SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 47:23, at 306-07).

<sup>190</sup> *Id.* at 33.

<sup>191</sup> *Id.* at 34 n.27.

Cooper concluded by stressing that “[i]t is, of course, the statute’s text that best informs Congressional intent.”<sup>192</sup> Cooper’s statement is absurd, considering that, as the Fifth Circuit aptly noted, CERCLA’s “syntax is confused, its grammar inexact and its relationship to other CERCLA provisions ambiguous.”<sup>193</sup>

## **2. Amicus Curiae Brief Supporting Petitioner**

The Solicitor General, on behalf of the United States, submitted the only amicus curiae brief in support of Cooper’s position. As noted by one astute lawyer, “the government’s role in CERCLA actions . . . represents both the interests of the EPA in its ongoing efforts to implement CERCLA to clean up contaminated properties and it represents numerous other governmental departments and agencies who are subject to contribution action brought by other PRPs.”<sup>194</sup> Apparently, the Solicitor General was unconcerned with the conflict of interest the government faced regarding the issue, since in the government’s brief “it acts as if it is an uninterested party merely interpreting a statute.”<sup>195</sup>

The government’s first argument was that the plain language of § 113(f)(1) “makes clear that a party may seek contribution under CERCLA only ‘during or following’ a civil action under section 106 or section 1079(a).”<sup>196</sup> The government suggested that § 113(f)(1)’s “permissive phrasing . . . indicates that Congress intended to

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<sup>192</sup> Brief for the Petitioner at 40.

<sup>193</sup> *Aviall Services, Inc.*, 312 F.3d at 680-81.

<sup>194</sup> John S. Gray, *Reinventing CERCLA: Will The Supreme Court Overturn 20 Years Of Settled Contribution Practice In Aviall Services, Inc. v. Cooper Industries*, 13-12 MEALEY’S EMERG. TOXIC TORTS 19 (2004).

<sup>195</sup> *Id.*

<sup>196</sup> Brief for the United States as Amicus Curiae Supporting Petitioner at 13, *Cooper Industries, Inc., v. Aviall Services, Inc.*, 125 S. Ct. 577 (2004) (No. 02-1192).

permit contribution claims to be brought when the stated prerequisites—namely that contribution be sought ‘during or following’ a Section 106 or Section 107(a) action—are satisfied.”<sup>197</sup> In a footnote, the government suggested this language is akin to a sign stating that “‘Visitors May Enter Through The Front Door During Normal Business Hours,’” which “informs the visitor that, if he wants to enter through the front door, he must do so through the prescribed period. It does not grant the visitor the right to use the front door at any time he wishes.”<sup>198</sup>

The government completely missed the mark with its example. In fact, the example helps demonstrate why the language is not as plain as the government suggested it was. While the visitor may not have the right to use the front door at any time he wishes, the language of the sign does not indicate that a visitor may, under no circumstances, enter through the front door during other than normal business hours. So too the language of § 113(f)(1) does not indicate that a PRP may, under no circumstances, bring a contribution claim before a § 106 or § 107(a) action has been taken against it.

The government wrapped up this section of its argument by opining that “[i]f Congress had intended to create an even broader form of contribution, it would have written the first sentence of Section 113(f)(1) to accomplish that result.”<sup>199</sup> This argument can easily be turned around to say that if Congress had intended to limit contribution, it would have written the first sentence of § 113(f)(1) (by stating that contribution “may **only**” be sought “during or following” a § 106 or § 107(a) action) to accomplish that result.

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<sup>197</sup> Brief for the United States as Amicus Curiae Supporting Petitioner at 15.

<sup>198</sup> *Id.* at 15 n.7.

<sup>199</sup> *Id.* at 17.



The government next argued that § 113(f)(1)'s text is "consistent with the traditional understanding of contribution."<sup>200</sup> It turned to the Third Restatement of Torts to explain that the right of contribution depends on the resolution of the underlying liability.<sup>201</sup> However, the government appeared to have forgotten the traditional understanding of contribution in the pre-SARA era of Superfund contribution claims where the courts specifically found a common law right of contribution without a resolution of the underlying liability.<sup>202</sup>

Then, the government argued that § 113(f)(1)'s text is "consistent with CERCLA as a whole."<sup>203</sup> The government apparently had a change of heart since its amicus curiae brief in a previous case wherein the government argued that all parties undertaking a voluntary cleanup should be permitted to seek contribution under § 113.<sup>204</sup>

The government then claimed that § 113(f)(1)'s plain language is "consistent with CERCLA's legislative history."<sup>205</sup> Amusingly, the government boldly asserted that "[b]ecause Section 113(f)(1)'s language is clear, there is no need to consult its legislative history."<sup>206</sup> It seems as if the government knew there was no real support for its position in CERCLA's legislative history. However, the government strained to find support in

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<sup>200</sup> Brief for the United States as Amicus Curiae Supporting Petitioner at 17.

<sup>201</sup> *Id.*

<sup>202</sup> *See supra* Section II.A.3.

<sup>203</sup> Brief for the United States as Amicus Curiae Supporting Petitioner at 19.

<sup>204</sup> John S. Gray, *supra* note 194 (citing Brief for Atlantic Richfield Company, et al. as Amici Curiae Supporting Respondent, at 24; *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1304-05 (9<sup>th</sup> Cir. 1997), *cert. denied*, 524 U.S. 937 (1998)).

<sup>205</sup> Brief for the United States as Amicus Curiae Supporting Petitioner at 23.

<sup>206</sup> *Id.*

CERCLA's legislative history.<sup>207</sup> The government quickly glossed over the fact that "[t]he pertinent Senate and House bills that ultimately became SARA contained differently worded contribution provisions" and instead relied on language and reports from bills that were ultimately rejected by the House and Senate to make their conclusion that "the legislative history confirms that Section 113(f)(1) states what Congress meant and means what it says."<sup>208</sup>

The government's final argument is that "[t]he court of appeals construction of Section 113(f)(1) rests on unpersuasive extra-textual considerations."<sup>209</sup> Again the government put on its blinders and relied solely on the statutory text, suggesting that "[b]ecause the 'existing statutory text' of Section 113(f)(1) precisely answers the question presented here, there is no warrant for attempting to derive guidance from the pre-SARA 'predecessor statute . . . ,' which did not address the question of contribution at all."<sup>210</sup> It is far from clear that the existing statutory text precisely answered the question presented in this case, or the question would have never brought about such controversy in the first place.

Ironically, the government suggested that the Fifth Circuit Court of Appeals "attempted to derive guidance from unstated assumptions and 'isolated dicta' in other lower court decisions."<sup>211</sup> Perhaps the government mislabeled their copies of the decisions of the panel majority or the district court judge, the individuals who, in fact,

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<sup>207</sup> Brief for the United States as Amicus Curiae Supporting Petitioner at 23-24.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 24.

<sup>210</sup> *Id.* at 25.

<sup>211</sup> *Id.*

mistakenly attempted to derive guidance from unstated assumptions and isolated dicta from other lower court decisions.

Interestingly, the government next attempted to discredit its own employees in suggesting that “[r]esponsible parties may have assumed that Section 113(f)(1) provides a broader contribution remedy than its language would support, and it is possible that **errant language in some government briefs** may have nurtured that assumption.”<sup>212</sup> (emphasis added). Interestingly, when Aviall asked the Solicitor General for specific examples of this errant language in government briefs, the Solicitor General advised Aviall that it “was aware of no specific case in which the Department had taken a contrary position or used ‘errant’ language.”<sup>213</sup>

In attempting to downplay and disavow actual knowledge of these government briefs, the government instead draws more attention to its obvious change of heart and, as stated by one legal author, “[t]he government’s conflict of interest on this issue suggests that its arguments should at least be viewed with skepticism[;] indeed, the conflict is so severe that the arguments probably should be disregarded entirely.”<sup>214</sup>

The government closed its arguments with an astute observation: “Ultimately, the task of reconciling the competing policy interests should be left to Congress.”<sup>215</sup> Unfortunately, the government’s “plain reading” of the text of § 113(f)(1) leads it to the

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<sup>212</sup> Brief for the United States as Amicus Curiae Supporting Petitioner at 25-26. *See also* John S. Gray, *supra* note 194.

<sup>213</sup> Brief for the Respondent at 13 n.6, *Cooper Industries, Inc. v. Aviall Services, Inc.*, 125 S. Ct. 577 (2004) (No. 02-1192).

<sup>214</sup> John S. Gray, *supra* note 194.

<sup>215</sup> Brief for the United States as Amicus Curiae Supporting Petitioner at 29.

wrong conclusion that the text “adopts the traditional practice of allowing a party to seek contribution only if that party is itself subject to suit.”<sup>216</sup>

### 3. Brief of Respondent, Aviall Services, Inc.

As Aviall noted in its brief:

Petitioner’s argument . . . is virtually unprecedented. No federal court of appeals has ever adopted that position—with the exception of the Fifth Circuit panel below . . . . [P]etitioner’s argument is not only incorrect but also deeply destructive to the system for assigning liability under CERCLA that has been well-established and smoothly functioning in the lower courts for years.<sup>217</sup>

While I would not have used the term “smoothly functioning” to describe the system for assigning liability under CERCLA as Aviall did, since there have been one or two bumps along the way, the system was definitely well-established.<sup>218</sup>

Aviall’s first main argument was that § 113 “expressly authorizes parties to seek ‘contribution’ from other liable parties.”<sup>219</sup> Aviall turned to common law and argued that “a formal court adjudication of liability is not a prerequisite to an action for contribution at common law.”<sup>220</sup> Aviall used the *Restatement (Second) of Torts* and *Black’s Law Dictionary* definitions of contributions to support its argument, noting that even the Department of Justice had taken this position in the past.<sup>221</sup>

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<sup>216</sup> Brief for the United States as Amicus Curiae Supporting Petitioner at 29.

<sup>217</sup> Brief for the Respondent at 11.

<sup>218</sup> See John M. Hyson, *supra* note 142, at 10825 (noting that the en banc decision was consistent with the “general understanding of the lower courts and of the Superfund bar).

<sup>219</sup> Brief for the Respondent at 11.

<sup>220</sup> *Id.* at 12.

<sup>221</sup> *Id.* at 12-13.

Aviall went on to discuss the treatment of PRPs seeking contribution by federal appellate courts. Aviall noted the courts have specifically held that “because any claim by one PRP against another is necessarily a ‘contribution’ claim, PRPs not only **may** sue under § 113, but indeed **must** sue under § 113 instead of under § 107’s cost recovery provisions.”<sup>222</sup> (emphasis added). In fact, as Aviall argued, if there is no right to contribution in the absence of a civil lawsuit or settlement under § 106 or § 107(a), there is no logical reason for insisting that PRPs sue under § 113.<sup>223</sup>

To end this section of its argument, Aviall dismissed the petitioner’s concern that allowing a right to contribution in the absence of a § 106 or § 107(a) civil action would create a “double” liability for other PRPs. As Aviall stated, a PRP can only recover clean-up costs “if they are consistent with the National Contingency Plan . . . . As a result, cases in which PRPs may seek recovery of costs necessarily involve clean-ups that are of ‘CERCLA-quality’ and entirely adequate, giving the government no reason to impose additional obligations on anyone.”<sup>224</sup>

Aviall next argued the text of § 113 itself allows for a contribution action by PRPs.<sup>225</sup> Aviall logically reasoned that the text of § 113(f)(1) provides that a contribution right may be brought “during or following” a “civil action” under CERCLA, but not only “during or following” a “civil action” under CERCLA. “Petitioner would read that provision as establishing the exclusive time in which actions for contribution must be

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<sup>222</sup> Brief for the Respondent at 14 (referring to cases discussed previously in its brief. *See e.g. Akzo Coatings Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7<sup>th</sup> Cir. 1994); *In re Reading Co.*, 115 F.3d 1111, 1121 (3d Cir. 1997)).

<sup>223</sup> *Id.* at 14-15.

<sup>224</sup> *Id.* at 12-13.

<sup>225</sup> *Id.* at 16.

brought. But as the en banc court of appeals concluded, that reading would revise the statute so that ‘may’ becomes ‘may only.’”<sup>226</sup> Aviall again attempted to hold the Department of Justice’s feet to the fire by noting that it previously read the text of § 113(f)(1) the same way Aviall did.<sup>227</sup>

Aviall attempted to demonstrate Cooper’s illogical interpretation of the text of § 113(f)(1) by carrying Cooper’s argument through to its natural conclusion:

If, as petitioner argues, the word ‘may’ is read to mean ‘may only,’ then it follows that actions for contribution may not be brought when clean-ups are undertaken in compliance with federal or state administrative orders. Section 113(f)(1) allows actions for contribution ‘during or following any civil action,’ and an administrative order is not a ‘civil action.’<sup>228</sup>

Aviall noted that when confronted with this conclusion, which was inconsistent with CERCLA’s intent, the Fifth Circuit panel majority creatively rewrote § 113(f)(1) to read “civil action or administrative order.”<sup>229</sup>

Aviall also contradicts Cooper’s reading of the savings clause in the final sentence of § 113(f)(1). Cooper read the savings clause as a mechanism to preserve state common law contribution claims, again reading words into the statute that were not there and apparently ignoring two other explicit state law savings clauses in the process.<sup>230</sup> “In short, the last sentence of § 113(f)(1) acts not as a savings clause preserving state claims, but as an express reservation of CERCLA’s once-implied right of contribution—which is

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<sup>226</sup> Brief for the Respondent at 17.

<sup>227</sup> *Id.* at 18.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at n.9.

<sup>230</sup> *Id.* at 19-20.

not ‘diminished’ in any way by the ‘during or following’ language found earlier in the subsection.”<sup>231</sup>

Aviall then turned to the legislative history and statutory structure of CERCLA to conclude that nothing in them compels a reason to overturn the decision of the en banc court below. Aviall astutely pointed out that “[o]nly one thing is clear from the legislative history. In adopting § 113(f), Congress intended to ‘clarify’ and ‘confirm’ the right of contribution that federal courts had previously found implied in the statute.”<sup>232</sup> Aviall also noted that nothing in the legislative history supported Cooper’s position that Congress intended to limit the contribution rights found implicitly by pre-SARA courts.<sup>233</sup> As noted previously by the en banc court majority and by Judge Weiner in his panel dissent, Aviall observed that “[b]eyond confirming Congress’ intent to approve the right of contribution, the legislative history must be viewed with caution.”<sup>234</sup>

Aviall followed this argument by rebutting Cooper’s claims that CERCLA’s statute of limitations mandate that § 113(f)(1) be read to preclude contribution actions that do not arise during or following a § 106 or § 107(a) civil action. Specifically, Cooper had claimed that the statute of limitations in § 113(g)(3) relies on a judgment or settlement to trigger it. To rebut, Aviall pointed out that the courts of appeal who have faced this issue have resolved this issue by concluding that “an action by a PRP brought in the absence of a prior judgment or settlement is for limitation purposes an ‘initial

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<sup>231</sup> Brief for the Respondent at 21.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 21-22.

<sup>234</sup> *Id.* at 22.

action for recovery' subject to § 113(g)(2)'s statute of limitations."<sup>235</sup> Aviall also noted that the statute of limitations was not at issue in this case.<sup>236</sup>

Aviall's second main argument was that Cooper's position was inconsistent with CERCLA's purpose and decades of precedent in case law. Aviall pointed out that one important objective of CERCLA was to encourage PRPs to voluntarily clean up hazardous waste sites.<sup>237</sup> Aviall reasoned that if Cooper's position were adopted by the Supreme Court, it would remove a significant incentive to those PRPs considering voluntary cleanup of hazardous waste sites.<sup>238</sup> Aviall took that reasoning a step further and argued that adopting Cooper's position would create a significant disincentive to any voluntary action on the part of a PRP.<sup>239</sup> As Aviall rightly noted, "[n]othing in the language or history of CERCLA warrants a construction that increases the need for federal involvement and discourages voluntary [cleanups]."<sup>240</sup> Aviall is right on target with this argument and it seems odd that the government would argue the opposite position for the mere fact that it would create more work for them in the long run.

Aviall then argued that Cooper's reading of CERCLA would enable some PRPs to escape liability if another PRP cleans up property voluntarily.<sup>241</sup> In essence, the PRP who voluntarily cleaned up would bear the entire cost of cleanup, leaving the remaining

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<sup>235</sup> Brief for the Respondent at 24.

<sup>236</sup> *Id.* at 25.

<sup>237</sup> *Id.* at 26 (citing H.R. REP. NO. 96-1016, pt. 1, at 17 (1980), reprinted in 1980 U.S.C.C.A.N. 6119).

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 27.

<sup>241</sup> Brief for the Respondent at 27.



PRPs completely free from liability, an outcome that is completely contrary to the SARA amendments to CERCLA.

Aviall also argued that Cooper's reading of CERCLA would subject PRPs who voluntarily clean up hazardous waste sites to inconsistent state contribution rules.<sup>242</sup> As Aviall noted, state statutes authorizing contribution rights vary substantially, and "[s]uch an approach to the remediation of hazardous substances is simply inconsistent with Congress' intent to develop a uniform, national rule of liability. Indeed § 113(f)(1) itself provides that the right of contribution under CERCLA 'shall be governed by federal law.'"<sup>243</sup>

To wrap up this subsection, Aviall dispelled the concerns of Cooper and the government that allowing contribution rights in the absence of a CERCLA civil action would result in PRPs being subjected to additional litigation and liability because of inadequate voluntary cleanups.<sup>244</sup> "Because the NCP provides that response actions taken by private parties must result in a 'CERCLA-quality cleanup,' there is little risk that an approved cleanup will require further intervention and hence impose additional liability on PRPs."<sup>245</sup> Additionally, as Aviall noted, "even following a civil action or settlement with the government, most PRPs remain liable for any additional actions that might be necessary at the site."<sup>246</sup>

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<sup>242</sup> Brief for the Respondent at 28.

<sup>243</sup> *Id.* at 29-3 (footnote omitted).

<sup>244</sup> *Id.* at 30-31.

<sup>245</sup> *Id.* at 3 (citation omitted).

<sup>246</sup> *Id.*

Aviall next argued that Cooper's position was contrary to well-established federal case law.<sup>247</sup> Aviall noted that the Fifth Circuit decision was the first federal court of appeals to expressly address the issue at hand.<sup>248</sup> Nearly every federal court to address the issue afterward agreed with the Fifth Circuit en banc decision, and prior to the en banc decision, the Fifth Circuit panel majority opinion was rejected by every district court to address the issue.<sup>249</sup>

Another compelling argument used by Aviall was that the EPA, through NCP regulations, specifically considered an action for recovery by PRPs in the absence of a civil action.<sup>250</sup> Specifically, there are some provisions of Subpart H of the NCP that "only apply to private parties who clean up in the absence of a federal administrative order, settlement, or civil action. . . . EPA considers such private party [cleanups] to be appropriate because these elements of the NCP ensure that such private clean-ups are conducted properly."<sup>251</sup>

Aviall wrapped up this section with a reliance argument, stating that "PRPs have relied on their federal right to recover clean-up costs from other PRPs when buying contaminated property."<sup>252</sup> Aviall observed that if the Supreme Court were to rule for Cooper and thereby end contribution rights for PRPs who voluntarily clean up hazardous waste sites, "many properties would remain contaminated and unusable," thereby

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<sup>247</sup> Brief for the Respondent at 32.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at 34.

<sup>251</sup> *Id.* at 35 (citing 50 FED. REG. 47,912, 47,934 (1985)).

<sup>252</sup> *Id.*

reducing the marketability of contaminated property and stunting the re-development of brownfields.<sup>253</sup>

Aviall's third (and final) main argument was really an alternative plea to the Court. Aviall asked the Court to remand the case for consideration of Aviall's 107(a)(4)(B) claim if it agreed with Cooper's argument regarding contribution rights under § 113.<sup>254</sup> Aviall's argument was that Cooper and the Solicitor General cannot have it both ways.<sup>255</sup> In closing off § 113 as an avenue for PRPs to sue for contribution in the absence of a civil action or settlement, Cooper and the Solicitor General necessarily open up another avenue for a cost-recovery claim under § 107.<sup>256</sup> As Aviall noted, "there is nothing in the language or legislative history of SARA to even suggest that Congress intended to severely restrict rights of cost recovery under CERCLA by precluding suit under both § 113 and § 107."<sup>257</sup>

Finally, Aviall reasoned that Cooper's argument would create two separate avenues of claims for PRPs.<sup>258</sup> PRPs seeking cost recovery during or following a civil action would pursue a contribution claim under § 113(f), while PRPs seeking cost recovery without a civil action under CERCLA would pursue a claim under § 104(a)(4)(B).<sup>259</sup> Aviall basically ended by stating that while this position is not in tune with Congressional intent regarding contribution rights, it is a position Aviall would live

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<sup>253</sup> Brief for the Respondent at 35.

<sup>254</sup> *Id.* at 36.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.* at 37.

<sup>258</sup> *Id.*

<sup>259</sup> Brief for the Respondent at 37-38.

with in the alternative.<sup>260</sup> While Aviall was not conceding anything to Cooper, Aviall alerted the Court that it could live with an alternative that still allowed an avenue to pursue cost recovery.

#### **4. Amicus Curiae Briefs Supporting Respondent**

There were five amicus curiae briefs filed in support of Aviall's position in the case, representing a wide variety of entities: private corporations, trade associations, non-profit associations, environmental organizations, twenty-three states, and the commonwealth of Puerto Rico. All had a substantial stake in the outcome of this case.

##### **a. Brief of Lockheed Martin**

Lockheed Martin (hereinafter Lockheed) filed its own amicus curiae brief to support Aviall's position. As a private company that had spent millions of dollars implementing voluntary remediation programs at several of its facilities in reliance on its contribution rights, Lockheed was concerned that companies, such as itself, that "engage in voluntary remediation activity unjustly and unjustifiably would be forced to bear costs that are in large part attributable to other parties."<sup>261</sup> Lockheed argued that Aviall's suit was authorized under § 107(a) and preserved by the savings clause of § 113(f)(1).<sup>262</sup>

Lockheed relied on the Supreme Court's decision in *Key Tronic*<sup>263</sup> to support its argument that § 107(a) "authorizes potentially responsible parties to sue other PRPs to

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<sup>260</sup> Brief for the Respondent at 38.

<sup>261</sup> Brief of Lockheed Martin Corporation as Amicus Curiae in Support of Respondent at 2, *Cooper Industries, Inc., v. Aviall Services, Inc.*, 125 S. Ct. 577 (2004) (No. 02-1192).

<sup>262</sup> *Id.* at 7.

<sup>263</sup> *Key Tronic Corp.*, 511 U.S. 809.

recover voluntarily incurred response costs.”<sup>264</sup> Next, Lockheed, like Aviall, turned to the text of § 113(f)(1) and the purpose and legislative history of CERCLA to support its argument that Aviall’s claim is preserved by the savings clause of § 113(f)(1).<sup>265</sup> Finally, Lockheed rebutted Cooper’s arguments that Aviall’s suit created anomalies in CERCLA’s liability scheme and argued that it was, in fact, Cooper’s position that would create anomalies in CERCLA’s liability scheme.<sup>266</sup> Specifically, Lockheed argued that “[t]he rule proposed by Cooper . . . . would unaccountably reward recalcitrant parties that refuse to comply with federal abatement orders and punish companies that comply ab initio with such orders by depriving them of contribution rights.”<sup>267</sup>

The most interesting part of Lockheed’s brief appeared toward the end when it effectively called into question the government’s motive in submitting a brief in support of Cooper. “The federal government . . . stands to gain a tremendous windfall. The federal government is itself a PRP at numerous sites throughout the country and would effectively be given a veto over the right of other PRPs to seek contribution from it if the decision below were reversed.”<sup>268</sup> This statement alone should have caused the Supreme Court to discount the government’s *amicus curiae* brief in support of Cooper.

#### **b. Brief of Superfund Settlements Project, et al.**

The associations who joined forces to file another brief in support of Aviall (hereinafter Superfund Settlements Project Group) had member companies who at the

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<sup>264</sup> Brief of Lockheed Martin Corporation as *Amicus Curiae* in Support of Respondent at 8.

<sup>265</sup> *Id.* at 15-21.

<sup>266</sup> *Id.* at 21-30.

<sup>267</sup> *Id.* at 25.

<sup>268</sup> *Id.* at 26.

time had collectively been performing cleanups at “hundreds of contaminated sites throughout the United States at a cumulative cost well in excess of \$10 billion.”<sup>269</sup> The Superfund Settlements Project Group argued that restricting contribution rights would frustrate the central purpose of CERCLA by discouraging and delaying the cleanup of contaminated sites.<sup>270</sup> Specifically, the Superfund Settlements Project Group point to long standing EPA policies regarding the NCP, which explicitly stated that “it is important to encourage private parties to perform voluntary cleanup of sites, and to remove unnecessary obstacles to their ability to recover their costs from the parties that are liable for the contamination.”<sup>271</sup>

The Superfund Settlements Project Group also noted the government’s potential windfall if Cooper’s position were to be adopted by the Court. “Restricting the right of contribution would also produce uniquely unjust results at the many thousands of sites contaminated by the departments and agencies of the United States itself. These include . . . the many private sites to which the United States contributed waste.”<sup>272</sup>

The final argument the Superfund Settlements Project Group made was that contribution claims under state law do not provide the incentive for swift and effective cleanups as Cooper and the government suggested they do.<sup>273</sup> The Superfund Settlements Project Group argued that CERCLA may preempt state law contribution

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<sup>269</sup> Brief of Amici Curiae Superfund Settlements Project, et al. in Support of Respondent at 2, *Cooper Industries, Inc., v. Aviall Services, Inc.*, 125 S. Ct. 577 (2004) (No. 02-1192).

<sup>270</sup> *Id.* at 7.

<sup>271</sup> *Id.* at 11 (citing the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 55 Fed. Reg 8666, 8792-93 (Mar. 8, 1990) (codified at 40 C.F.R. pt. 300, subpt. H (2003))).

<sup>272</sup> *Id.* at 16.

<sup>273</sup> Brief of Amici Curiae Superfund Settlements Project, et al. in Support of Respondent at 25.

claims in many cases, that many defendants are not amenable to suit in state court, that suits seeking contribution from the United States would frequently be barred by sovereign immunity, and that choice-of-law questions would bog down many contribution claims.<sup>274</sup>

**c. Brief of Atlantic Richfield, et al.**

Three PRPs, two engineering and consulting firms, and one environmental organization (hereinafter the Atlantic Richfield Group) teamed up to submit yet another brief in support of Aviall. While the Atlantic Richfield Group represented “diverse interests in cleanup of contaminated property” under CERCLA, all shared the view that “CERCLA should be interpreted to encourage and not penalize responsible parties who step forward to undertake prompt and environmentally protective cleanups of contaminated sites.”<sup>275</sup>

The Atlantic Richfield Group’s first argument was that Cooper’s position substantially undermined three important policy goals of CERCLA: “(1) to promote rapid and effective cleanup of contaminated property by private parties, (2) to provide greater fairness in the joint and several liability scheme of CERCLA, and (3) to reduce litigation and transaction costs.”<sup>276</sup>

To support their argument that promoting rapid and effective cleanup of sites was a goal of CERCLA, the Atlantic Richfield Group turned to a legislative sponsor of the SARA amendments, Representative Lent, who stated: “I am especially proud of a key

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<sup>274</sup> Brief of Amici Curiae Superfund Settlements Project, et al. in Support of Respondent at 24-26.

<sup>275</sup> Brief for Atlantic Richfield Company, et al. as Amici Curiae Supporting Respondent at 1, *Cooper Industries, Inc., v. Aviall Services, Inc.*, 125 S. Ct. 577 (2004) (No. 02-1192).

<sup>276</sup> *Id.* at 4.

groundbreaking structural reform that will encourage responsible parties to come forward and take responsibility for cleaning up the toxic waste sites they helped create.”<sup>277</sup> The Atlantic Richfield Group also relied on Congressional hearings on the SARA amendments, the passage of the Small Business Liability Relief and Brownfields Revitalization Act and existing EPA policy for reaching Memoranda of Agreement (MOA) with states on voluntary clean-up programs.<sup>278</sup> The Atlantic Richfield Group concluded that this guidance indicated “a broad right of contribution is essential for encouraging safe and effective private party cleanup of CERCLA sites.”<sup>279</sup>

Regarding the second goal of reducing litigation and transaction costs, the Atlantic Richfield Group demonstrated the goal was repeated “through the SARA legislative history.”<sup>280</sup> They rebutted the opposing argument that broad contribution rights would increase litigation by stating that “the expectation is that most contribution claims can be resolved without protracted litigation” and arguing that if contribution litigation was necessary, “such litigation furthers the overall goals of CERCLA with little, if any, added expense to the government.”<sup>281</sup>

Then the Atlantic Richfield Group turned to Congressional testimony and judicial decisions to support their position that there has been recognition that broad contribution rights were necessary for a fair enforcement process. Specifically, they quoted then-Assistant Attorney General Habicht, who stated during Congressional oversight hearings

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<sup>277</sup> 131 CONG. REC. 16573 (1985); Brief for Atlantic Richfield Company, et al. as Amici Curiae Supporting Respondent at 5.

<sup>278</sup> Brief for Atlantic Richfield Company, et al. as Amici Curiae Supporting Respondent at 5-6.

<sup>279</sup> *Id.* at 7.

<sup>280</sup> *Id.* at 8.

<sup>281</sup> *Id.* at n.2.



that “the fairness of a joint and several liability scheme depends upon the clear availability of contributions.”<sup>282</sup> The Atlantic Richfield Group also cited *Colorado v. ASARCO, Inc.*<sup>283</sup> as an example of a pre-SARA case where the district court judge found a right to contribution under CERCLA and held that contribution rights were essential to the fairness of CERCLA’s liability scheme.<sup>284</sup>

The Atlantic Richfield Group then proceeded to argue that Cooper’s interpretation of CERCLA would undermine these three objectives, resulting in “a CERCLA enforcement scheme that substantially diminishes incentives for voluntary cleanups by private parties, increases litigation costs, and is less fair.”<sup>285</sup> The Atlantic Richfield Group observed that “[t]he United States does not dispute these points, but instead contends that, given what it perceives as clear statutory language, these arguments should be made to Congress . . . not to this Court in deciding the interpretation of the existing statute.”<sup>286</sup>

The Atlantic Richfield Group’s second argument was that Cooper’s interpretation of contribution rights was contrary to the plain statutory language of CERCLA.<sup>287</sup> Like Lockheed Martin, the Atlantic Richfield Group relied on the Court’s holding in *Key Tronic* that § 107 “unquestionably provides a cause of action for private parties to seek

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<sup>282</sup>Brief for Atlantic Richfield Company, et al. as Amici Curiae Supporting Respondent at 8 (citing Oversight Hearings Before the House Subcomm. On Admin. Law and Governmental Relations, Comm. on the Judiciary, 99<sup>th</sup> Cong. 51 (1985)).

<sup>283</sup> *Colorado v. ASARCO, Inc.*, 608 F. Supp. 1484 (D. Colo. 1985).

<sup>284</sup> Brief for Atlantic Richfield Company, et al. as Amici Curiae Supporting Respondent at 9.

<sup>285</sup> *Id.* at 9.

<sup>286</sup> *Id.* (citation omitted).

<sup>287</sup> Brief for Atlantic Richfield Company, et al. as Amici Curiae Supporting Respondent at 18.

recovery of cleanup costs.”<sup>288</sup> Next, they stated that “Congress in enacting SARA was interested in expanding those rights” and focused on the issue of contribution rights after voluntary cleanup, rights that were already found to exist in some pre-SARA courts.<sup>289</sup> From this, the Atlantic Richfield Group argued that SARA added “explicit contribution language simply to clarify and confirm”<sup>290</sup> existing rights of contribution. They logically reasoned that the “during or following” language was added to CERCLA to “make it clear that a defendant sued under CERCLA could seek contribution even in the same action in which it itself was sued—in other words, the contribution claim could be brought ‘during or following’ the government’s action.”<sup>291</sup>

The Atlantic Richfield Group went on to highlight that despite the government’s insistence that its position regarding contribution rights under CERCLA had remained consistent over the years, the government’s position had, in fact, changed 180 degrees.<sup>292</sup> They specifically noted that in its briefs in *Pinal Creek*<sup>293</sup> and *Centerior Service*,<sup>294</sup> the government argued that PRPs undertaking voluntary cleanup could not sue for cost recovery under § 107 but instead were permitted to seek contribution under § 113.<sup>295</sup> Especially damning was a quote from the government’s brief in *Centerior Service*

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<sup>288</sup> *Key Tronic Corp.*, 511 U.S. at 811; Brief for Atlantic Richfield Company, et al. as Amici Curiae Supporting Respondent at 18.

<sup>289</sup> Brief for Atlantic Richfield Company, et al. as Amici Curiae Supporting Respondent at 20.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *Id.* at 22-26.

<sup>293</sup> *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298 (9<sup>th</sup> Cir. 1997).

<sup>294</sup> *Centerior Service Co.*, 153 F.3d 344.

<sup>295</sup> Brief for Atlantic Richfield Company, et al. as Amici Curiae Supporting Respondent at 22-26.

wherein the government argued that “the plain language of CERCLA § 113(f)(1) is not restrictive, i.e., it does not say that a contribution action may only be brought during or following a civil action under CERCLA.”<sup>296</sup>

Next, the Atlantic Richfield Group argued that the counter-textual result of Cooper’s interpretation of §§ 107 and 113—“entirely denying recovery under CERCLA to an entire class of private parties”—could be resolved in one of two ways.<sup>297</sup> The first, and more preferable way, was to reject Cooper’s interpretation of § 113(f) and conclude that § 113(f) “simply clarifies that a contribution claim can be brought during a Section 106 or 107 action, and need not wait for the conclusion of the government suit.”<sup>298</sup> The second, and less preferable way, was for the Court to clarify that a PRP who has undertaken a cleanup voluntarily, but has not been sued under CERCLA § 106 or § 107, may still “recover costs from other liable parties under the ‘any other person’ language of Section 107.”<sup>299</sup>

Finally, the Atlantic Richfield Group argued that the government’s contention that § 113 is “premised on the narrow rules [of contribution] that existed under common law” is unfounded.<sup>300</sup> They pointed to the explicit language of § 113(f)(3) and EPA policy

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<sup>296</sup> Brief for Atlantic Richfield Company, et al. as Amici Curiae Supporting Respondent at 24 (citing Brief of Defendants-Appellees Secretary of Defense, Secretary of Veterans Affairs, and Administrator of National Aeronautics and Space Administration in Centerior Service at 28 (6<sup>th</sup> Cir. 1997)).

<sup>297</sup> *Id.* at 26.

<sup>298</sup> *Id.* at 26-27.

<sup>299</sup> *Id.* at 28.

<sup>300</sup> *Id.* at 28-30.

guidance from 1985 in asserting that CERCLA contribution rights were “intended to displace rigid common law contribution rights.”<sup>301</sup>

**d. Brief of the State of New York, et al.**

“Given the importance of the right to contribution as an incentive to settle with a state,” this group of twenty-three states and the Commonwealth of Puerto Rico (hereinafter the States), in filing a brief in support of Aviall opposed “assigning unwarranted significance to Congress’ failure to identify a specific period of limitations, particularly where Congress explicitly grants a right to contribution elsewhere in the statute.”<sup>302</sup>

The States rebutted the argument of both Cooper and the Solicitor General that CERCLA’s statute of limitations provided support for Cooper’s position. The States argued that “the fact that CERCLA § 113(g)(3) expressly provides a period of limitations for bringing a contribution claim in certain circumstances should not be interpreted to mean that in any instance where CERCLA fails to establish a period of limitations, a right to contribution does not exist.”<sup>303</sup>

To support their argument, the States noted that “when CERCLA was enacted in 1980 and amended in 1986, it was far from unusual for Congress to create a cause of action but fail to provide a pertinent period of limitations, thereby leaving it to the courts to ‘borrow’ an appropriate applicable period from other sources of law.”<sup>304</sup> The States concluded that “[t]he fact that Congress frequently omits express periods of limitations,

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<sup>301</sup> Brief for Atlantic Richfield Company, et al. as Amici Curiae Supporting Respondent at 28-30.

<sup>302</sup> Brief of the States of New York, et al. as Amici Curiae in Support of Respondent at 1, *Cooper Industries, Inc., v. Aviall Services, Inc.*, 125 S. Ct. 577 (2004) (No. 02-1192).

<sup>303</sup> *Id.* at 3.

<sup>304</sup> *Id.* at 8 (citing *North Star Steel Co. v. Thomas*, 515 U.S. 29, 33 (1995)).

therefore, weighs against any attempt by Petitioner and the United States to vest § 113(g)(3)'s silence with undue significance.”<sup>305</sup>

**e. Brief of ConocoPhillips Co., et al.**

One final brief in support of Aviall was filed by six companies (hereinafter the ConocoPhillips Group) that “include some of the largest corporate entities in the world . . . [that] have been and continue to be involved in hundreds of environmental cleanups at their facilities and other sites, including sites for which they have been identified as [PRPs] under [CERCLA].”<sup>306</sup> The ConocoPhillips Group noted that they had collectively engaged in over 170 voluntary cleanups without the threat of a civil action under CERCLA, despite the fact that other parties were responsible for the contamination.<sup>307</sup> They went on to state that they had been willing to do that in the past “because for two decades settled law has ensured that other PRPs eventually would pay their fair share through the CERCLA contribution mechanism.”<sup>308</sup>

The ConocoPhillips Group first argued that a plain reading of the text of CERCLA § 113(f)(1) does not preclude an action for contribution in the absence of a civil action under §§ 106 or 107.<sup>309</sup> In fact, the ConocoPhillips Group appropriately noted that “the text of Section 113(f)(1) does not lend itself to [Cooper’s] (or any other)

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<sup>305</sup> Brief of the States of New York, et al. as Amici Curiae in Support of Respondent at 3.

<sup>306</sup> Brief Amici Curiae of ConocoPhillips Co., et al. in Support of Respondent Aviall Services, Inc. at 1, *Cooper Industries, Inc., v. Aviall Services, Inc.*, 125 S. Ct. 577 (2004) (No. 02-1192).

<sup>307</sup> *Id.* at 1-2.

<sup>308</sup> *Id.* at 2.

<sup>309</sup> *Id.* at 6.

‘plain meaning’ interpretation.”<sup>310</sup> They agreed with the Fifth Circuit’s findings that the text was inconclusive and interpreting the text “with reference to CERCLA’s underlying, remedial purposes” and statutory construction rules results in “[r]eading the final sentence of CERCLA Section 113(f)(1) to preserve both state law contribution remedies and the federal common law contribution right previously recognized and enforced by the courts irrespective of the existence of a civil action under Section 106 or 107.”<sup>311</sup>

The ConocoPhillips Group’s second argument was that Cooper’s interpretation of § 113(f)(1) was inconsistent with Congressional intent to confirm rights of contribution under SARA.<sup>312</sup> In support of its argument, the ConocoPhillips Group noted that the courts in the years between CERCLA and SARA had “fashioned a federal common law contribution rights among parties that were jointly liable for response costs under Section 107, regardless of whether there had been a civil action under Section 106 or 107.”<sup>313</sup>

The ConocoPhillips Group pointed out that there was “no evidence to suggest that, by enacting Section 113(f)(1), Congress intended to cut back the contribution rights federal courts had recognized under CERCLA.”<sup>314</sup> They argued that CERCLA’s legislative history, in fact, demonstrated the contrary—“that lawmakers desired the courts

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<sup>310</sup> Brief Amici Curiae of ConocoPhillips Co., et al. in Support of Respondent Aviall Services, Inc. at 7.

<sup>311</sup> *Id.* at 7-8.

<sup>312</sup> *Id.* at 10.

<sup>313</sup> *Id.* at 11.

<sup>314</sup> *Id.* at 11-12.

to develop the scope of CERCLA contribution consistent with evolving principles of federal common law.”<sup>315</sup>

The ConocoPhillips Group’s third argument was that Cooper’s interpretation of § 113(f)(1) was inconsistent with the fundamental purposes of CERCLA: encouraging rapid cleanup of hazardous waste sites and ensuring the costs of cleanup are equitably allocated among the PRPs.<sup>316</sup> Regarding CERCLA’s purpose of encouraging rapid cleanup, the ConocoPhillips Group reasoned that “it would be perverse to interpret the statute to punish voluntary or cooperative compliance.”<sup>317</sup> As far as CERCLA’s purpose of ensuring the costs of cleanup are equitably allocated among the PRPs, they stated that “[i]t is inconceivable that Congress intended to condition the sharing of costs among responsible parties on a company’s willingness to close its viable business or defy EPA’s administrative enforcement orders.”<sup>318</sup>

The ConocoPhillips Group’s final argument was that Cooper’s interpretation of § 113(f)(1) was inconsistent with Congressional intent to treat the United States, when a PRP, the same as any other PRP.<sup>319</sup> They argued that Cooper’s (and the government’s) interpretation of § 113(f)(1) was “fundamentally inconsistent with the broad waiver of sovereign immunity embodied in CERCLA.”<sup>320</sup> As the ConocoPhillips Group astutely observed, Cooper’s position “would create numerous options for strategic gaming by the

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<sup>315</sup> Brief Amici Curiae of ConocoPhillips Co., et al. in Support of Respondent Aviall Services, Inc. at 12 (citing 126 CONG. REC 30,932 (1980); 126 CONG. REC. 31,965 (1980)).

<sup>316</sup> *Id.* at 16.

<sup>317</sup> *Id.* at 23.

<sup>318</sup> *Id.* at 27.

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

government to avoid liability for contamination the government itself is responsible for.”<sup>321</sup>

In conclusion, the ConocoPhillips Group strongly argued that “[t]he various means by which the United States could limit a responsible party’s recourse against other polluters would have the pernicious effect of distorting the government’s enforcement priorities and allowing the United States to evade liability for its own role in contaminating property. Congress plainly never intended that result.”<sup>322</sup>

### 5. Oral Argument

The Supreme Court heard oral argument on Wednesday, October 6, 2004. Mr. William B. Reynolds, speaking on behalf of Cooper, argued that for a party “to proceed under 113, the statute is very clear that a right of contribution by a responsible party under 113 is . . . an action that can be maintained during or following what is an enforcement action under 106 or 107 of CERCLA brought by the United States . . . .”<sup>323</sup>

During Mr. Reynolds’ argument, Justice Ginsburg expressed her understanding that Aviall was not just cleaning up the site voluntarily because the State had threatened to take enforcement action against them.<sup>324</sup> Then Justice Ginsberg questioned whether Cooper’s interpretation of § 113 requiring a civil action would result in a delay of

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<sup>321</sup> Brief Amici Curiae of ConocoPhillips Co., et al. in Support of Respondent Aviall Services, Inc. at 29.

<sup>322</sup> *Id.* at 30.

<sup>323</sup> Oral Argument at 6, *Cooper Industries, Inc., v. Aviall Services, Inc.*, 125 S. Ct. 577 (2004) (No. 02-1192).

<sup>324</sup> *Id.* at 6-7.



hazardous waste cleanup, in essence “saying don’t clean up sooner, wait until, say, EPA goes after you.”<sup>325</sup>

Justice Kennedy was concerned with whether a PRP could sue another PRP under § 107 if § 113 was unavailable to it.<sup>326</sup> “[I]f you’re going to take the position below that a PRP can’t sue, then maybe that would have some bearing on how we’d interpret 113.”<sup>327</sup>

Justice Stevens confronted Mr. Reynolds with the savings clause, stating that “conceivably one could read the savings clause as saying whatever Federal remedy was available between 1980 and 1986 is still available. And if one read it that way, then the question would be, could this very action have been brought in 1983 or 4?”<sup>328</sup> Justice Stevens asked whether there were any cases with similar facts where, “without specific statutory authorization, the judge found an implied basis for allowing recovery.”<sup>329</sup>

Justice Breyer stated his impression that, while the old common law rule was that there was no contribution among tortfeasors, statutes and judicial decisions changed that so the contribution right is now available almost everywhere.<sup>330</sup> Mr. Reynolds replied that “the right of contribution, as it’s understood today, still contemplates shared liability by—by the two parties, the—the tortfeasors, as against a third party.”<sup>331</sup>

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<sup>325</sup> Oral Argument at 7; Jessica Simmons, *Superfund Attorneys Argue Over Right of Contribution In Voluntary Cleanups Before Supreme Court*, 194 DEN A-1 (2004).

<sup>326</sup> *Id.* at 10.

<sup>327</sup> *Id.* at 11.

<sup>328</sup> *Id.*

<sup>329</sup> *Id.* at 15.

<sup>330</sup> *Id.*

<sup>331</sup> Oral Argument at 15.

Justice Souter asked Mr. Reynolds whether he had a response to Aviall's argument that "EPA resolves lots of actions without complete cleanup, so that the possibility, even in contribution cases that [Cooper] would allow, would be later EPA action against another polluter."<sup>332</sup> Mr. Reynolds' answer was that "it wouldn't be the kind of duplication and multiplication that you'd get if you read the statute the way [Aviall did]."<sup>333</sup>

Next, Mr. Jeffrey P. Minear spoke on behalf of the United States as Amicus Curiae in Support of Cooper. Mr. Minear argued that § 113(f)

does not allow contribution in the absence of a settlement or civil action for three reasons. First, that's exactly what section 113(f) says. Second, that's consistent with the traditional understanding of the concept of contribution. And third, that will lead to the most efficient mechanism for cleanup and settlement.<sup>334</sup>

Justice Stevens asked Mr. Minear whether the government had changed its position, as Aviall had suggested, and, if so, what the difference was between the government's former and present position.<sup>335</sup> Mr. Minear attempted to skirt the issue by pointing out this is a case of first impression, by suggesting there had been no change in position, by noting the Solicitor General did not review the brief cited by Aviall, and by claiming that what Aviall is "characterizing as a change in position is a consistent position."<sup>336</sup> Of course, Mr. Minear was quick to back step by stating that "in terms of our internal deliberations in the—in the Government, there might well be people who

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<sup>332</sup> Oral Argument at 16-17.

<sup>333</sup> *Id.* at 18.

<sup>334</sup> *Id.* at 19-20.

<sup>335</sup> *Id.* at 20.

<sup>336</sup> *Id.* at 20-22.

take a different view with regard to the position we've taken here from the perspective that the more suits that are brought, the more cleanup there might be.”<sup>337</sup>

Justice Ginsberg took issue with the government's reading of the word “only” into the first sentence of § 113(f)(1), stating that “[t]he plain language of CERCLA 113(f)(1) is not restrictive, i.e., it does not say that a contribution action may only—you read the word only. That's not in the statute—be brought during or following a civil action under CERCLA.”<sup>338</sup> Mr. Minear attempted to dodge this bullet by agreeing that “it does not say that it may only be brought in the—in the case of a—in the absence of a civil action or a—a civil action under 106 or 107.”<sup>339</sup> Why this sudden change of heart? Because, Mr. Minear argued, “[i]t can also be brought in the case of a settlement as well.”<sup>340</sup>

Justice Ginsberg then asked Mr. Minear if, practically speaking, it would be realistic for someone in Aviall's position to inform the EPA of a contaminated site and obtain a settlement quickly. Mr. Minear argued that while there might be situations where the EPA will defer to the State, “if they had entered into a judicial—administrative settlement with the State, that would entitle them to contribution.”<sup>341</sup>

Representing Aviall before the Supreme Court was Mr. Richard O. Faulk. First, Mr. Faulk attempted to clear up any confusion about Aviall's pleadings in the case.<sup>342</sup> As Mr. Faulk pointed out, the controlling law of the Fifth Circuit at the time “recognized that

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<sup>337</sup> Oral Argument at 22.

<sup>338</sup> *Id.* at 23.

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> *Id.* at 26-27.

<sup>342</sup> *Id.* at 29.

section 113 had a cause of action, recognized the cause of action, but that there was a similar and somewhat overlapping cause of action within section 107 for the same relief.”<sup>343</sup>

Next, Mr. Faulk attempted to rebut the “persistent myth” that Aviall engaged in a voluntary cleanup.<sup>344</sup> “Aviall acted under a directive of the—of the State government very specifically in a proceeding that we received a letter for . . . . [T]he State of Texas said clean this up or else.”<sup>345</sup> Justice Scalia, however, noted that the Court takes questions that are presented when the parties don’t—don’t object to it,” and Aviall did not object to the use of the word voluntary in the question presented by Cooper.<sup>346</sup>

Next, Justice O’Connor asked how Aviall fell into the provision of § 113(f) when Aviall admits no civil action had been brought and § 113(f) says a person may seek contribution during or following a civil action under § 106 or § 107(a). Mr. Faulk pointed to the savings clause of § 113(f)(1) and argued that it was referring back to § 107, and not to state law as Cooper suggested.<sup>347</sup>

Justice Scalia took issue with Mr. Faulk’s position and opined that it effectively read out the first sentence of the statute.<sup>348</sup> “[Y]ou’re saying any person may seek contribution during or after and they may also seek contribution at any other time. I

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<sup>343</sup> Oral Argument at 32.

<sup>344</sup> *Id.*

<sup>345</sup> *Id.* at 32-33.

<sup>346</sup> *Id.* at 33.

<sup>347</sup> *Id.* at 34.

<sup>348</sup> *Id.* at 42.

mean, why—why have the limitation? You’re just reading it out. It makes no sense.”<sup>349</sup>

Mr. Faulk replied, “I have to take the words of Congress as they are, as—as we all do. I can only say that there’s nothing in the statute that says it’s restrictive.”<sup>350</sup> He re-emphasized the argument that the word may was permissive as opposed to mandatory.<sup>351</sup>

In this context, we have a permissive statute. We have a remedial statute. We have a statute that’s intended to achieve a purpose that is intended in a broad, remedial sense. And that purpose is consistent with the goals and objectives of the statute. This Court should not consider the statute standing alone in a vacuum.<sup>352</sup>

Mr. Faulk wrapped up his argument by noting the ridiculous contribution process that will ensue if the Court decided in favor of Cooper: “[W]e will have a multiplicity of litigation. [PRPs] will be going to the Federal Government to get orders from the Federal Government . . . only to disobey those orders, after they’re entered, to get the Government to sue them [so they can pursue contribution against other PRPs].”<sup>353</sup>

#### **IV. Supreme Court Decision**

The Supreme Court decided the case on December 13, 2004.<sup>354</sup> Somewhat surprisingly, considering that the Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits had all previously ruled that contribution rights are available prior to an

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<sup>349</sup> Oral Argument at 42-43.

<sup>350</sup> *Id.* at 44.

<sup>351</sup> *Id.* at 45.

<sup>352</sup> *Id.* at 46.

<sup>353</sup> *Id.* at 48.

<sup>354</sup> *Cooper Industries, Inc., v. Aviall Services, Inc.*, 125 S. Ct. 577 (2004).

enforcement action, the decision was 7-2 in favor of Cooper.<sup>355</sup> Justice Thomas, who delivered the Court's opinion, was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, Souter and Breyer.<sup>356</sup> Justice Ginsberg filed the dissenting opinion, joined by Justice Stevens.<sup>357</sup>

#### **A. Majority Opinion: Section 113 Contribution Action Must be Preceded by Involuntary Cleanup**

The majority specifically held that a private party who has not been sued under CERCLA § 106 or § 107(a) may not obtain contribution under CERCLA § 113(f)(1) from other liable parties.<sup>358</sup> In reaching its conclusion, the Court first went through a brief history of CERCLA and summarized that:

[A]fter SARA, CERCLA provided for a right to cost recovery in certain circumstances, § 107(a), and separate rights to contribution in other circumstances . . . § 113(f)(1) ('during or following' specified civil actions), and § 113(f)(3)(B) (after an administrative or judicially approved settlement that resolves liability to the United States or a State).<sup>359</sup>

In a footnote, the Court attempted to wrestle itself out of its observation in *Key Tronic*<sup>360</sup> that § 107 and § 113 created "similar and somewhat overlapping"<sup>361</sup> remedies by stating, "[t]he cost recovery remedy of § 107(a)(4)(B) and the contribution remedy of § 113(f)(1)

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<sup>355</sup> See John Stam, et al., *Superfund: No Contribution Lawsuit Absent Enforcement U.S. Supreme Court Rules In CERCLA Case*, 239 DEN A-1 (2004); Ron Cardwell, *Voluntary Cleanups: Down for the Count or Just on the Ropes?*, 16-MAY S.C. LAW. 14 (2005).

<sup>356</sup> *Cooper Industries, Inc.*, 125 S. Ct. at 580.

<sup>357</sup> *Id.* at 586.

<sup>358</sup> *Id.* at 580.

<sup>359</sup> *Id.* at 582, 584.

<sup>360</sup> *Key Tronic Corp.*, 511 U.S. 809.

<sup>361</sup> *Id.* at 816.

are similar at a general level in that they both allow private parties to recoup costs from other private parties. But the two remedies are clearly distinct.”<sup>362</sup>

After a brief recitation of the facts and procedural history, the Court began its analysis of the plain language of the statute. The Court held that “[t]he natural meaning of [the first] sentence [of § 113(f)(1)] is that contribution may only be sought subject to the specified conditions, namely, ‘during or following’ a specified civil action.”<sup>363</sup> The Court rejected Aviall’s argument that the word “may” should be read permissively instead of exclusively, reasoning that “the natural meaning of ‘may’ in the context of the enabling clause is that it authorizes certain contribution actions—ones that satisfy the subsequent specified condition—and no others.”<sup>364</sup>

The Court next noted that if Congress had intended § 113(f)(1) to authorize contribution at any time, it would not have included the conditional words “during or following.”<sup>365</sup> “In other words, Aviall’s reading would render part of the statute entirely superfluous, something we are loath to do.”<sup>366</sup> The Court further opined that the language of § 113(f)(3)(B) permitting contribution actions after settlement would also be superfluous under Aviall’s reading of § 113(f)(1).<sup>367</sup> “There is no reason why Congress

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<sup>362</sup> *Cooper Industries, Inc.*, 125 S. Ct. at 582 n.3.

<sup>363</sup> *Id.* at 583.

<sup>364</sup> *Id.*

<sup>365</sup> *Id.*

<sup>366</sup> *Id.*

<sup>367</sup> *Id.*

would bother to specify conditions under which a person may bring a contribution claim, and at the same time allow contribution actions absent those conditions.”<sup>368</sup>

The Court was not persuaded by Aviall’s argument regarding the savings clause contained in the last sentence of § 113(f)(1) either, stating:

the sole function of the sentence is to clarify that § 113(f)(1) does nothing to ‘diminish’ any cause(s) of action for contribution that may exist independently of § 113(f)(1) . . . . The sentence, however, does not itself establish a cause of action; nor does it expand § 113(f)(1) to authorize contribution actions not brought ‘during or following’ a § 106 or § 107(a) civil action; nor does it specify what causes of action for contribution, if any, exist outside § 113(f)(1).<sup>369</sup>

In other words, the Court was saying they had no idea what causes of action the savings clause was referring to, but it definitely was not referring to a cause of action for a company who had voluntarily cleaned up a hazardous waste site.

Finally, the Court pointed to the lack of a provision for triggering a statute of limitations period if a civil action never occurs, such as when there is a voluntary clean-up, for supporting their conclusion that a private party who has not been sued under § 106 or § 107(a) may not obtain contribution from other liable parties under § 113(f)(1).<sup>370</sup> “The lack of such a provision supports the conclusion that, to assert a contribution claim under § 113(f), a party must satisfy the conditions of either § 113(f)(1) or § 113(f)(3)(B).”<sup>371</sup>

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<sup>368</sup> *Cooper Industries, Inc.*, 125 S. Ct. at 583.

<sup>369</sup> *Id.* at 583-584.

<sup>370</sup> *Id.* at 584.

<sup>371</sup> *Id.*



Curiously, the Court declined to delve into the purpose of CERCLA, despite the insistence of each side that the purpose of CERCLA supports its reading of § 113(f)(1).<sup>372</sup> Instead, the Court stated that “[g]iven the clear meaning of the text, there is no need to resolve this dispute or to consult the purpose of CERCLA at all.”<sup>373</sup> Perhaps the Court knew that it would be hard pressed to show how its reading of the plain language of the statute was consistent with the purpose of CERCLA.

The Court also declined to address the issue of whether an administrative order would qualify as a civil action under § 106 or § 107(a), finding that Aviall had not been subjected to an administrative order under § 106.<sup>374</sup>

Despite the urging of Justices Ginsberg and Stevens in the dissent, the Court also declined to address the issue of whether, in the alternative, a cost-recovery action was available to Aviall under § 107(a)(4)(B), even though it was a PRP.<sup>375</sup> The Court listed several rationales for not addressing this issue. The first was that the issue had not been addressed in the courts below. The second was that the issue had not been fully briefed by the parties. The Court concluded that “[i]n view of the importance of the § 107 issue and the absence of briefings and decisions by the court below, we are not prepared—as the dissent would have it—to resolve the § 107 question solely on the basis of dictum in *Key Tronic*.”<sup>376</sup>

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<sup>372</sup> *Cooper Industries, Inc.*, 125 S. Ct. at 584.

<sup>373</sup> *Id.*

<sup>374</sup> *Id.* at 584 n.5.

<sup>375</sup> *Id.* at 584-86.

<sup>376</sup> *Id.* at 585.

Finally, the Court declined to address the issue of whether Aviall has an implied right to contribution under § 107.<sup>377</sup> The Court noted that in enacting SARA, “Congress explicitly recognized a particular set (claims ‘during or following’ the specified civil actions) of the contribution rights previously implied by courts . . . . Nonetheless, we need not and do not decide today whether any judicially implied right of contribution survived the passage of SARA.”<sup>378</sup> In conclusion, the Court noted that its limited holding was that § 113(f)(1) did not support Aviall’s suit, reversed the judgment of the Fifth Circuit, and remanded the case for further proceedings consistent with its opinion.<sup>379</sup>

#### **B. Justice Ginsberg’s Dissent: Section 107 Claims**

Justice Ginsberg, joined by Justice Stevens, dissented from the majority in this case not because they disagreed with the majority’s reading of § 113, but because they believed that the majority was unnecessarily deferring a decision on Aviall’s entitlement to recover cleanup costs from Cooper.<sup>380</sup> The dissent relied on *Key Tronic*<sup>381</sup> to support their position that a right to contribution for PRPs is implicit in the text of § 107(a).<sup>382</sup> The dissent noted that the Court in *Key Tronic* was divided on whether the right to contribution in § 107(a) was implicit or explicit, but that “no Justice expressed the

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<sup>377</sup> *Cooper Industries, Inc.*, 125 S. Ct. at 586.

<sup>378</sup> *Id.*

<sup>379</sup> *Id.*

<sup>380</sup> *Id.* at 586 (Ginsberg, J., dissenting).

<sup>381</sup> *Key Tronic Corp.*, 511 U.S. 809.

<sup>382</sup> *Cooper Industries, Inc.*, 125 S. Ct. at 587 (Ginsberg, J., dissenting).

slightest doubt that § 107 indeed did enable a PRP to sue other covered persons for reimbursement, in whole or part, of cleanup costs the PRP legitimately incurred.”<sup>383</sup>

In conclusion, the dissent pointed to the Fifth Circuit’s previous determination that “[f]ederal courts, prior to the enactment of § 113(f)(1), had correctly held that PRPs could ‘recover [under § 107] a proportionate share of their costs in actions for contribution against other PRPs,’ [and] nothing in § 113 retracts that right,” and opined that remanding the issue to the Fifth Circuit was only “protracting this litigation by requiring the Fifth Circuit to revisit a determination it has essentially made already.”<sup>384</sup>

## **V. Potential Ramifications of Supreme Court Decision on Military Procurements**

Regardless of one’s beliefs regarding the ruling of the Supreme Court in this case, it is obvious that the Court’s decision will have an enormous impact on the environmental community at large.<sup>385</sup> With as many as 450,000 sites in the United States containing hazardous wastes, it seems inevitable that the Court’s decision will have a lasting impact on the way PRPs approach hazardous waste cleanup.<sup>386</sup>

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<sup>383</sup> *Cooper Industries, Inc.*, 125 S. Ct. at 586 (Ginsberg, J., dissenting); *Key Tronic Corp.*, 511 U.S. 809.

<sup>384</sup> *Cooper Industries, Inc.*, 125 S. Ct. at 588 (citation omitted) (footnote omitted) (Ginsberg, J., dissenting).

<sup>385</sup> See Patricia Pearlberg, *Should a CERCLA Contribution Action Be Available To Potentially Responsible Parties Absent Federal Civil Action?*, 19 J. NAT. RESOURCES & ENVTL. L. 1, 33 (2004-2005); Kathy Robb and Marian Waldmann, *Supreme Court Limits Potentially Responsible Parties’ Right to Bring Contribution Claims Under CERCLA Section 113*, 12 DEN B-1 (2005); John Stam, et al., *supra* note 355; Ron Cardwell, *Voluntary Cleanups; Down For The Count Or Just On The Ropes?*, 16-MAY S.C. LAW. 14, 52 (2005); David Ivanovich, *supra* note 94.

<sup>386</sup> Kathy Robb and Marian Waldmann, *supra* note 385 (citing U.S. General Accounting Office, *Community Development: Local Growth Issues: Federal Opportunities and Challenges*, (RCED-00-178 118 (Sept. 2000)).

As a result of the decision, developers who clean up brownfields<sup>387</sup> that have not been designated as Superfund sites will not have CERCLA contribution rights to recover cleanup costs from other PRPs. Therefore, these developers will have to look to state statutes and common law to attempt to recover costs from other PRPs or rely more on scarce public funding. "As buyers consider the added expense, time and uncertainty . . . they may reconsider taking on a property that they formerly might have purchased and cleaned up voluntarily with the intent of pursuing contribution without having to be sued themselves or entering into an approved settlement first."<sup>388</sup> The ultimate outcome will likely be a reduction in the number of brownfields being revitalized.

Additionally, PRPs at non-brownfield sites will be discouraged from voluntarily cleaning up sites without first seeking an administrative settlement to preserve their contribution rights. "Challenges to administrative settlements by parties potentially affected by the settlement at a particular site also will add cost and delay."<sup>389</sup> However, even administrative settlements may not be enough to preserve contribution rights according to the government's amicus curiae brief.<sup>390</sup>

[A]ccording to the government, a company that receives and complies with a UAO and incurs millions of dollars in response costs has no right of contribution under CERCLA. Following the government's analysis, only when a company stands up to the EPA and forces it to file a lawsuit in order to enforce its order will the company ensure its contribution rights. Accordingly, if the government is correct, only prior litigation can justify a contribution action under CERCLA. Hence, an informal, prompt and relatively inexpensive procedure that currently works will be

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<sup>387</sup> A brownfield site is "an abandoned, idled, or underused industrial or commercial site that is difficult to expand or redevelop because of environmental contamination." BLACK'S LAW DICTIONARY (8<sup>th</sup> ed. 2004).

<sup>388</sup> Kathy Robb and Marian Waldmann, *supra* note 385.

<sup>389</sup> *Id.*

<sup>390</sup> Brief for the United States as Amicus Curiae Supporting Petitioner at 22, n.11.

replaced by a formal, lengthy and expensive court proceeding that guarantees only unnecessary delays and complications.<sup>391</sup>

There is an obvious conflict of interest present if “a PRP cannot sue the federal government for contribution unless the government first brings an enforcement action against the PRP or enters into an approved settlement with the PRP.”<sup>392</sup> As noted by the lead counsel for Aviall, “Worse yet, the government itself, which is one of the nation’s largest polluters, may resist reimbursing private parties who have already cleaned up polluted properties formerly owned by the United States. Those results do not serve the public interest, and they are certainly inconsistent with [Congressional intent].”<sup>393</sup>

This conflict of interest within the federal government is likely to have a significant impact on future government procurements from the private sector. This section will specifically discuss the potential impact the Court’s decision will have on military procurements, both past and future.

#### **A. History of CERCLA Issues In Military Procurements**

One of the issues that arose soon after the passage of CERCLA was whether private parties were responsible for environmental cleanup of former military contractor sites (some dating back to events before World War II) used in the production of supplies necessary for the defense of the United States.<sup>394</sup> Following are the leading cases that developed legal principles for determining whether a private party can obtain some type

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<sup>391</sup> John S. Gray, *supra* note 194.

<sup>392</sup> Kathy Robb and Marian Waldmann, *supra* note 385.

<sup>393</sup> Richard O. Faulk, *quoted in* 18-4 MEALEY’S POLL. LIAB. REP. 1 (2005).

<sup>394</sup> See Michael T. Janik & Michael Reis, *CERCLA Claims Against The Government: Rediscovering World War II Contracting Rules*, 66 FED. CONT. REP. 9 (1996); Major Randall James Bunn, *Contractor Recovery For Current Environmental Cleanup Costs Under World War II-Era Government Contract Indemnification Clauses*, 41 A.F. L. REV. 163 (1997); Major Kenneth Michael Theurer, *supra* note 81.

of contribution from the United States for environmental cleanup costs incurred as a result of a military procurement.

### 1. *Elf Atochem North America, Inc. v. United States*

*Elf Atochem*<sup>395</sup> involved the issue of CERCLA liability of the United States based on ownership. “While there would be little issue in situations where the government furnished an entire plant, as in the case of a ‘GOCO’ (government-owned contractor-operated facility), the issue is murkier when the government provides machinery or equipment that is used at a defense contractor plant.”<sup>396</sup>

Elf Atochem North America, Inc. (hereinafter Elf) leased equipment necessary to produce DDT, a pesticide, from the United States in 1944, under a contract to assist the war effort. Years later, the groundwater and land around Elf’s Pittstown, New Jersey, site was found to be contaminated with several hazardous chemicals, including chlorobenzene and benzene, chemicals used in the manufacture of DDT. In 1983, the EPA placed the Pittstown site on the National Priorities List (NPL). The EPA entered into a consent decree with ELF in 1992, requiring Elf to remediate the site but allowing it to seek contribution for the remediation from other PRPs. Elf brought a contribution action against the United States as a PRP under CERCLA § 116 and subsequently filed a motion for summary judgment “only on the issue of the United States’ liability as an owner.”<sup>397</sup>

Judge Joyner established a six-part test to determine ownership liability under CERCLA: 1) ownership 2) of a facility 3) at which hazardous substances 4) were

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<sup>395</sup> *Elf Atochem North America, Inc. v. United States*, 868 F. Supp. 707 (E.D. Pa. 1994).

<sup>396</sup> Major Kenneth Michael Theurer, *supra* note 81, at 83 (footnote omitted).

<sup>397</sup> *Elf Atochem Inc.*, 868 F. Supp. at 708.

disposed 5) and from which there is a release or threatened release 6) requiring the incurrence of response costs.<sup>398</sup> Because there was no dispute that the United States owned the equipment leased to Elf, the government unsuccessfully attempted to argue that there was no disposal of, nor release or threatened release of, a hazardous substance.<sup>399</sup>

The basic lesson to learn from this case is that if the government provides property to a defense contractor, it may be found liable as an “owner” of a facility under CERCLA § 107. However, “[l]iability in these cases is extremely fact specific and may depend on contract clauses defining ownership of property. Without being able to show actual government ownership of the affected facility, defense contractors have to look to a different theory on which to hold [the government] liable.”<sup>400</sup>

## **2. *FMC Corp. v. U.S. Dept. of Commerce***

*FMC*<sup>401</sup> concerned a textile rayon facility situated in Front Royal, Virginia. The facility was owned by American Viscose Corporation from 1937 until 1963, when it was purchased by FMC. While the textile rayon machines were not initially set up to produce high tenacity rayon, in 1940 the War Production Board (WPB) commissioned American Viscose Corporation to convert its plant to produce high tenacity rayon to assist the war effort. “Inasmuch as the facility was used for a program critical to the success of the war

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<sup>398</sup> *Elf Atochem Inc.*, 868 F. Supp. at 709.

<sup>399</sup> *Id.* at 710-12.

<sup>400</sup> Major Kenneth Michael Theurer, *supra* note 81, at 86.

<sup>401</sup> *FMC Corp. v. U.S. Dept. of Commerce*, 29 F.3d 833 (3d Cir. 1994).

effort, if American Viscose did not comply with the government's production requirements, the government would have seized the facility."<sup>402</sup>

In 1982, environmental inspections revealed carbon disulfide in the groundwater. Carbon disulfide is one of the five principal components used in making high tenacity rayon. The EPA began cleanup of the facility site and notified FMC of its potential CERCLA liability. FMC filed suit against the Department of Commerce under CERCLA § 113(f), seeking contribution from the United States alleging it was jointly responsible for the response costs because of its activities at the facility during World War II.

The Third Circuit Court of Appeals held that the United States was liable under CERCLA as both an arranger and operator of the facility. In making its determination that the United States acted as an operator of the facility, the Court turned to the "actual control" test noting it was "clear that the government had 'substantial control' over the facility and had 'active involvement in the activities' there. The government determined what product the facility would manufacture, . . . the level of production, the price of the product, and to whom the product would be sold."<sup>403</sup>

While this decision appeared to be a huge victory for private parties, courts were unable to find the type of all-encompassing control present in *FMC* when analyzing Vietnam-era military procurements and consistently found the United States was not acting as an operator.<sup>404</sup> It is evident that "the outcome of these types of disputes is very

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<sup>402</sup> *FMC Corp.*, 29 F.3d at 836.

<sup>403</sup> *Id.* at 843.

<sup>404</sup> Major Kenneth Michael Theurer, *supra* note 81, at 88.



much dependant on the types of facts and the quantity of facts developed which evidence government control.”<sup>405</sup>

### 3. *United States v. Vertac Chemical Corp.*

In *Vertac*,<sup>406</sup> the Eighth Circuit analyzed the issue of whether the United States was liable as an arranger when there was not enough government control over a contractor for the United States to be liable as an operator. *Vertac* dealt with a Vietnam-era military procurement with Hercules, Incorporated (hereinafter Hercules) for the production of Agent Orange, a chemical defoliant. In 1967, the United States directed Hercules to increase production of Agent Orange. This resulted in Hercules devoting the entire facility to the production of Agent Orange. Even with this increase in production, Hercules was unable to meet the government’s production demands and the government helped facilitate the importation of chemicals for Hercules.<sup>407</sup>

The Eight Circuit first analyzed the issue of operator liability and held that the United States was not liable as operator of a facility under § 9607(a)(2) because it “was not sufficiently involved, directly or indirectly, in the activities that took place . . . to constitute actual or substantial control.”<sup>408</sup>

The Court next turned to the issue of arranger liability. The legal standard used by the court was whether the United States “had the authority to control, and did control” the production process that led to the disposal of hazardous materials.<sup>409</sup> The Court did

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<sup>405</sup> Michael T. Janik & Michael Reis, *supra* note 394.

<sup>406</sup> *United States v. Vertac Chem. Corp.*, 46 F.3d 803 (8<sup>th</sup> Cir. 1995).

<sup>407</sup> Major Kenneth Michael Theurer, *supra* note 81, at 75.

<sup>408</sup> *Vertac Chem. Corp.*, 46 F.3d at 809.

<sup>409</sup> *Id.* at 810.

not require proof of “personal ownership or actual physical possession of hazardous substances a precondition” to finding arranger liability.<sup>410</sup>

The Court rejected Hercules’ argument that the government was liable as an arranger based on the regulatory powers of the United States, holding that “a governmental entity may not be found to have owned or possessed hazardous substances under § 9607(a)(3) merely because it had statutory or regulatory authority to control activities which involved the production, treatment or disposal of hazardous substances.” Before finding arranger liability, the court required proof of actual knowledge of, immediate supervision over, and direct responsibility for arranging for the transportation or disposal of hazardous substances.<sup>411</sup> The Court did not find any of those facts present in this case.

The Court also rejected Hercules’ argument that the government was liable as an arranger based on the contractual relationship between the United States and Hercules. The Court held that while previous case law “certainly suggests that circumstances may exist where a government contract involves sufficient coercion or governmental regulation and intervention to justify the United States’ liability as an arranger under CERCLA,” there were no facts to support such a finding in this case.<sup>412</sup>

Hercules’ final argument that the government was liable as an arranger based on the *Aceto*<sup>413</sup> case was also rejected by the Court. Specifically, Hercules argued that the United States should be liable as an arranger under *Aceto* “because the United States

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<sup>410</sup> *Vertac Chem. Corp.*, 46 F.3d at 810.

<sup>411</sup> *Id.*

<sup>412</sup> *Id.* at 811.

<sup>413</sup> *Aceto Agricultural. Chemicals. Corp.*, 872 F.2d 1373.

(1) supplied the raw materials to Hercules for the production of Agency Orange . . . and  
(2) constructively possessed the hazardous substances by having the authority to control the supply of TCB, Hercules' production process and the end product."<sup>414</sup> The Court did not agree that the facts supported a conclusion that the United States actually or constructively supplied Hercules with the raw materials or that the United States constructively owned or possessed the raw materials or the process that generated hazardous wastes at the facility.<sup>415</sup>

While the government contractor did not prevail in this case, *Vertac* left open the possibility that a contractual relationship may lead to government liability in certain limited circumstances. "[T]he court appears to be focused on the government's direct involvement in the production and disposal of hazardous waste. The ordinary contractual relationship between buyer and seller will not result in government liability."<sup>416</sup>

#### **B. Potential Difficulties In Procuring Future Wartime Services**

As noted by one scholar, "[w]hen faced with the costly prospect of cleaning up a contaminated facility, defense contractors often turn to CERCLA to share the cost with other PRPs such as the United States."<sup>417</sup> In the wake of the *Aviall*<sup>418</sup> decision, defense contractors may think twice about contracting with the government for the production of materials that may leave their facilities environmentally contaminated in the future.

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<sup>414</sup> *Vertac Chem. Corp.*, 46 F.3d at 811.

<sup>415</sup> *Id.*

<sup>416</sup> Major Kenneth Michael Theurer, *supra* note 81, at 91 (footnote omitted).

<sup>417</sup> *Id.* at 77.

<sup>418</sup> *Cooper Industries, Inc.*, 125 S. Ct. 577.

Imagine it is some time in the future. An alternative fuel for powering jet aircraft has been manufactured by the Jetson Corporation (hereinafter Jetson). This fuel will make us less dependent on international oil and our own oil reserves. The United States is still engaged in overseas military conflicts and the Air Force wants to enter a contract with Jetson to supply this new fuel, as well as any parts necessary to adapt a current airframe to enable it to use the new fuel.

The executives at Jetson are aware that its fuel manufacturing process leaves an unusable chemical by-product. At this time, the chemical by-product does not contain any substances listed by the EPA or currently covered under CERCLA. While the Jetson Corporation does its best to ensure none of the chemical by-product is leached into the soil or groundwater, there is no guarantee that some of the by-product won't escape Jetson's containment procedures.

Given the unavailability of contribution rights after *Aviall*,<sup>419</sup> the legal department at Jetson is concerned about entering into this contract with the Air Force. Specifically, it is concerned that if the chemical by-product is ever determined to be harmful to human health or the environment and regulated by CERCLA, the government may choose not to list Jetson's fuel manufacturing site on the NPL, given the Air Force's potential liability for contribution. Given Jetson's corporate pledge to protect the environment, it will likely begin voluntary cleanup without an order from the EPA. Therefore, if Jetson has no contribution rights for voluntary cleanup, it will be forced to pay the entire cost of cleanup.

In deciding whether to compete for future military contracts, government contractors will be looking for ways to allocate some of the risk back to the United States.

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<sup>419</sup> *Cooper Industries, Inc.*, 125 S. Ct. 577.

The following section will analyze potential solutions to these problems facing government contractors in this post-*Aviall* era.

## **VI. Potential Procurement Solutions**

The three solutions to the post-*Aviall* problem of obtaining contribution from the United States after a voluntary cleanup of hazardous waste that I recommend are cost-recovery actions under CERCLA § 107, indemnification, and liability insurance. While these may not be the only solutions, they are ones that give government contractors a reasonable chance at obtaining cost recovery from the United States for cleanup costs resulting from military procurements.

### **A. “Cost-Recovery” Action Under CERCLA Section 107**

One issue the Supreme Court refused to address in *Aviall* was whether a PRP may bring an action against other PRPs under CERCLA § 107.<sup>420</sup> It has been suggested that “[t]he proper solution may be to revert to the pre-SARA interpretation of section 107 and allow a PRP to file a cost recovery action.”<sup>421</sup> Because pre-SARA courts found an implied right of contribution in CERCLA § 107, this action would not be a pure cost recovery claim.<sup>422</sup> While this is certainly an avenue for government contractors to pursue as a potential solution, there is no guarantee that the Supreme Court will rule in favor of PRPs if and when the issue is addressed.

However, if appellate court decisions are an indicator of how the Supreme Court will decide this issue, this road may well result in a dead end for government contractors.

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<sup>420</sup> See *infra* section IV.A.

<sup>421</sup> Richard O. Faulk & Cynthia J. Bishop, *There And Back Again: The Progression and Regression of Contribution Actions Under CERCLA*, 18 Tul. Envtl. L.J. 323, 336 (2005).

<sup>422</sup> See *infra* section II.A.3.

While pre-SARA courts found contribution rights for PRPs implied in CERCLA § 107, post-SARA appellate courts have consistently held that PRPs are limited to CERCLA § 113 contribution actions against other PRPs.<sup>423</sup> These appellate courts have held that cost-recovery actions under CERCLA § 107 are exclusively reserved for plaintiffs who are not PRPs.

## **B. Indemnification**

Another potential solution for government contractors is indemnification, which “is designed to shift the entire cost of tortious conduct to the party primarily responsible. (footnote omitted). Indemnity, as distinguished from contribution, is the complete shifting of [risk] from one party to another.”<sup>424</sup> An indemnification right may be provided for by statute, found in an express contractual agreement or sometimes implied from the nature of the relationship between the contracting parties.<sup>425</sup>

### **1. CERCLA Section 107(e)(1), 42 U.S.C. § 9607(e)(1)**

CERCLA itself contains a provision regarding liability-allocation agreements such as indemnification clauses. CERCLA § 107(e)(1) states:

No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in

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<sup>423</sup> See *United Technologies Corp. v. Browning-Ferris Industries*, 33 F.3d 96, 98-103 (1<sup>st</sup> Cir. 1994); *Bedford Affiliates v. Sills*, 156 F.3d 416, 423-24 (2d Cir. 1998); *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116, 1120-24 (3<sup>rd</sup> Cir. 1997); *Centerior Service Co.*, 153 F.3d at 349-56; *Pinal Creek Grp. v. Newmont Mining Corp.*, 118 F.3d at 1301-06; *Colorado and Eastern R.R. Co.*, 50 F.3d at 1534-36; *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1496 (11<sup>th</sup> Cir. 1996). See also Kathy Robb & Marian Waldmann, *supra* note 386; Wm. Bradford Reynolds & Lisa K. Hsiao, *supra* note 116, at 345-52.

<sup>424</sup> 34 AM. JUR. PROOF OF FACTS 3D 465 *Validity and Applicability of Contractual Allocations of Environmental Risk* § 5 (2005).

<sup>425</sup> *Id.*; See also Chris M. Amantea & Steven C. Jones, *The Growth Of Environmental Issues In Government Contracting*, 43 AM. U. L. REV. 1585, 1629-30 (1994).

this subsection shall bar any agreement to insure, hold harmless or indemnify a party to such agreement for any liability under this section.<sup>426</sup>

In essence, this section gives PRPs the ability to contractually allocate CERCLA liability among PRPs. However, these contractual agreements may not change the PRPs ultimate liability to the United States.<sup>427</sup> Given that limitation, it seems unlikely that a government contractor will find relief under the provisions of CERCLA itself.

## **2. Public Law 85-804**

Public Law 85-804 allows the President to authorize government agencies with national defense functions to indemnify government contractors against risks that are unusually hazardous or nuclear when the indemnification action will facilitate national defense.<sup>428</sup> Public Law 85-804 is implemented by the Federal Acquisition Regulations (FAR) at Part 50.<sup>429</sup> “These 85-804 clauses have been used in hundreds of inherently risky contracts when commercial insurance was inadequate.”<sup>430</sup> Although Public Law 85-804 was originally limited to emergency wartime contracting, the wartime limitation has since been removed from the statute.<sup>431</sup>

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<sup>426</sup> 42 U.S.C. § 9607(e)(1).

<sup>427</sup> Edward B. Grandy & Lisa Brown, *Risk Apportionment In Natural Resources Transactions Through Indemnification Clauses and Releases*, 22-NOV CORP. COUNS. REV. 209, 222 (2003).

<sup>428</sup> Pub. L. No. 85-804, 72 Stat. 972 (1958) (codified at 50 U.S.C. §§ 1431-35 (2002)); Exec. Order No. 11,610, 36 Fed. Reg. 13,755 (1971), *reprinted as amended in* 50 U.S.C. § 1431 (2002).

<sup>429</sup> FAR 50.000-50.403, 48 C.F.R. §§ 50.000-50.403 (2004).

<sup>430</sup> Patrick E. Tolan Jr., *supra* note 84, at 220.

<sup>431</sup> *Id.* (noting the remaining requirement to exercise these powers in support of national defense).

One potential roadblock to the use of indemnification clauses under Public Law 85-804 is the Anti-Deficiency Act.<sup>432</sup> “Because indemnification clauses commit the agency to pay an indefinite sum of money at a future date if certain events occur, there is no way to determine whether there are sufficient funds in the agency’s appropriation to cover liability when it arises.”<sup>433</sup> To defeat this roadblock, a government contractor must demonstrate that the Anti-Deficiency Act’s prohibition against obligating funds in advance of appropriations was excepted by Congress.<sup>434</sup> For World War II-era government contracts, Congressional exceptions may be found in the First War Powers Act or the Contract Settlement Act.<sup>435</sup>

When there is no statutory authority “such as that granted by Public Law 85-804 (footnote omitted) and DoD’s authority with respect to R&D contracts, (footnote omitted), open-ended indemnification provisions violate the Anti-Deficiency Act and are therefore unenforceable.”<sup>436</sup> Regardless, open-ended indemnifications should be avoided by government contractors, as clearly worded indemnification provisions will always be easier to enforce.

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<sup>432</sup> 31 U.S.C. §§ 1341, 1349-51, 1511-19 (1988 & Supp. V 1993).

<sup>433</sup> Chris M. Amantea & Steven C. Jones, *supra* note 425, at 1631.

<sup>434</sup> *See* Major Randall James Bunn, *supra* note 394, at 217.

<sup>435</sup> For an in-depth analysis of the indemnification issue as it relates to World War II-era government contracts, *see See* Major Randall James Bunn, *supra* note 394. For an in-depth analysis of the indemnification issue as it relates to Vietnam-era government contracts, *see* Major Kenneth Michael Theurer, *supra* note 81.

<sup>436</sup> 2 KAREN L. MANOS, GOVERNMENT CONTRACTS COST & PRICING 85:A:1(d) (2005).



### 3. Case Law

Three seminal federal cases dealing with the indemnification of government contractors are *Hercules*,<sup>437</sup> *DuPont*,<sup>438</sup> and *Ford*.<sup>439</sup>

#### a. *Hercules, Inc. v. United States*

While *Hercules*<sup>440</sup> doesn't deal specifically with indemnification of a government contractor for CERCLA cleanup costs, it shows how the Supreme Court views implied indemnification arguments.

During the Vietnam War, the government entered into a series of fixed-price contracts with Hercules, Wm. T. Thompson Company (hereinafter Thompson), and several other chemical manufacturers for the production of Agent Orange.<sup>441</sup> After the Vietnam War, Vietnam veterans and their families filed tort actions against Hercules and eight other manufacturers of Agent Orange claiming their exposure to Agent Orange resulted in health problems.<sup>442</sup> The lawsuits were consolidated into a class action which resulted in a \$180 million dollar settlement. Hercules and Thompson filed this lawsuit against the United States for reimbursement of the defense and settlement costs.<sup>443</sup>

One of Thompson's claims against the United States was a claim of contractual indemnification. Thompson argued that the United States, pursuant to § 707 of the Defense Production Act (DPA), made an implied promise to indemnify them for

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<sup>437</sup> *Hercules, Inc., et al. v. United States*, 516 U.S. 417 (1996).

<sup>438</sup> *DuPont*, 365 F.3d 1367.

<sup>439</sup> *Ford Motor Company v. United States*, 378 F.3d 1314 (Fed. Cir. 2004).

<sup>440</sup> *Hercules, Inc.*, 516 U.S. at 419.

<sup>441</sup> *Id.*

<sup>442</sup> *Id.* at 420.

<sup>443</sup> *Id.* at 421.

liabilities incurred in the performance of their duties under the DPA.<sup>444</sup> The Supreme Court rejected Thompson's argument for three reasons. First, the Court reasoned that it was unlikely that a contract would agree to such an open-ended indemnification agreement in clear violation of the ADA.<sup>445</sup> Second, the Court was unwilling to find an implied indemnity agreement when there were specific statutory mechanisms in place for providing indemnity to government contractors, should the government have wanted to use them.<sup>446</sup> Third, the Court held that § 707 of the DPA provided an immunity defense to liability, not indemnity to government contractors performing under the DPA.<sup>447</sup>

This decision makes it clear that the Supreme Court will not imply such open-ended agreements to indemnify contractors against third-party liability. Government contractors should only pursue this argument as a last resort, assuming the open-ended nature of the indemnity agreement was not in violation of the ADA.

**b. E.I. DuPont De Nemours & Co., Inc. v. United States**

*DuPont*,<sup>448</sup> unlike *Hercules*,<sup>449</sup> involved an explicit indemnification agreement between the United States and a government contractor. In 1940, the government entered a cost-plus-fixed-fee (CPFF) contract with E.I. DuPont De Nemours & Co., Inc. (hereinafter DuPont) to build and operate a chemical production facility in Morgantown,

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<sup>444</sup> *Hercules, Inc.*, 516 U.S. at 422, 426.

<sup>445</sup> *Id.* at 426-27.

<sup>446</sup> *Id.* at 428-29.

<sup>447</sup> *Id.* at 429-30.

<sup>448</sup> *DuPont*, 365 F.3d at 1370.

<sup>449</sup> *Hercules, Inc.*, 516 U.S. 417.

West Virginia, for the government's use in producing munitions. The contract included an indemnification clause that provided, in part, that:

[A]ll work . . . is to be performed at the expense of the government and . . . the Government shall hold [DuPont] harmless against any loss, expense (including expense of litigation) or damage (including damage to third persons because of death, bodily injury or property injury or destruction or otherwise) of any kind whatsoever arising out of or in connection with the performance of the work under this Title.<sup>450</sup>

In 1946, the government terminated the contract for convenience and entered into a supplemental agreement with DuPont that included an "Unknown Claims Clause" and a "Preservation of Indemnity Clause."<sup>451</sup>

In 1984, the EPA notified DuPont that it was proposing to list the West Virginia site on the NPL for cleanup under CERCLA. DuPont eventually agreed to conduct a remedial investigation and feasibility study of the site, an effort that cost DuPont more than \$1.3 million in attorney and consulting fees. DuPont filed a claim with the contracting officer for recovery of the costs pursuant to the Contract Disputes Act (CDA). After receiving no response, DuPont filed suit asserting that because of the indemnification clause, the government was ultimately responsible for the costs DuPont incurred.<sup>452</sup>

The Court of Federal Claims (COFC) ruled that despite the fact that the indemnification clause was "drafted broadly enough to be properly interpreted to place the risk of unknown liabilities on the government, including liability for costs incurred

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<sup>450</sup> *DuPont*, 365 F.3d at 1370.

<sup>451</sup> *Id.* at 1370-71.

<sup>452</sup> *Id.* at 1371. See also Major Kevin Huyser, *Contract Law And Fiscal Developments of 2004—The Year In Review: Fiscal Law: Antideficiency Act*, 2005 ARMY LAW. 175 (2004).

pursuant to CERCLA,” recovery was barred by the ADA.<sup>453</sup> After the decision was published, Professors Emeriti Nash and Cibinic commented on its absurd result, noting that “the history of the Anti-Deficiency Act indicates that hardly anyone, either in the Government or among contractors, would have known of this interpretation [of the ADA] in 1940 when the contract at issue in this case was signed.”<sup>454</sup>

The U.S. Court of Appeals for the Federal Circuit (CAFC) reversed COFC’s decision, holding that COFC correctly held that the indemnity agreement was valid but erred in finding that the ADA barred DuPont’s recovery.<sup>455</sup> The Court agreed with DuPont’s argument that the Contract Settlement Act of 1944 (CSA) “[exempted] the Preservation of Indemnity Clause (and, therefore, the Indemnification Clause) from the reach of the ADA.”<sup>456</sup> “Notably, the CAFC did not alter the long-standing rule among courts and the GAO that the ADA generally prohibits indemnification clauses.”<sup>457</sup> What CAFC did hold was that “[t]he CSA authorized the government to include the Preservation of Indemnity Clause in the Termination Supplement it entered into with DuPont in 1946, and that Clause ratified and preserved the broad indefinitely enduring indemnity the government granted DuPont in 1940 – an indemnity broad enough to include DuPont’s CERCLA liability.”<sup>458</sup>

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<sup>453</sup> *E.I. DuPont De Nemours & Co. v. United States*, 54 Fed. Cl. 361, 369 (2002).

<sup>454</sup> Ralph C. Nash & John Cibinic, *The Promise To Pay For Contingent Liability: Retroactive Interpretation of the Anti-Deficiency Act*, 17 NO. 3 NASH & CIBINIC REP. P.16 (2003).

<sup>455</sup> *DuPont*, 365 F.3d at 1374. See also Maureen Walterbach, *Article: Recent Developments: Contemporary Developments In Environmental And Land Use Law*, 20 J. LAND USE & ENVTL. LAW 269, 279 (2004).

<sup>456</sup> *DuPont*, 365 F.3d at 1374.

<sup>457</sup> Major Kevin Huyser, *supra* note 452, at 177.

<sup>458</sup> *DuPont*, 365 F.3d at 1380.

This decision will likely be helpful to any other government contractors who are dealing with the CERCLA cleanup of sites used during World War II-era contracts, but it is also a lesson in what the Courts require for an indemnification agreement between government contractors and the United States to fall under the exception to the ADA.

c. *Ford Motor Company v. United States*

*Ford*<sup>459</sup> is a similar case involving a reimbursement claim against the government for CERCLA costs resulting from a World War II-era contract. In 1940, the Ford Motor Company (hereinafter Ford) and the government entered into a CPFF contract to manufacture the B-24 Liberator bomber aircraft and spare parts. The contract included an indemnification provision.<sup>460</sup> As a result of the manufacturing process, there was a discharge of acid and cyanide chemical waste to Ford's waste treatment plant, sludge lagoon, and surrounding areas. The government terminated the contract after the war ended.

In 1988, the EPA notified Ford of its cleanup requirements under CERCLA for hazardous waste at its Willow Run site. This hazardous waste was due solely to waste produced during Ford's performance of its World War II contract with the government. Ford incurred nearly \$7.2 million in costs relating to the cleanup. Ford filed suit for reimbursement of these CERCLA-related costs. The COFC concluded that the government was not liable because the reimbursement provision in the Termination Agreement was not intended to be unlimited and there was no temporal relationship

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<sup>459</sup> *Ford Motor Company*, 378 F.3d at 1319.

<sup>460</sup> Major Kevin Huyser, *supra* note 452, at 176.

between contract performance and the environmental liability.<sup>461</sup>

The CAFC reversed COFC holding that “[t]he Termination Agreement with Ford by its terms includes all claims ‘not now known’ arising from performance of the War Contract; there is no temporal limit as to when the claims would become known, provided their origin is performance of the War Contract.”<sup>462</sup> The Court relied on its decision in *DuPont*,<sup>463</sup> holding that the Termination Agreement preserved the contract’s indemnification clause, which was sufficiently broad to cover CERCLA claims.<sup>464</sup>

The government did not argue that the indemnification clause violated the ADA in this case, perhaps because of the Court’s previous decision in *DuPont*.<sup>465</sup> Despite the government’s decision not to argue a violation of the ADA, CAFC decided to reiterate its decision that the ADA “does not bar recovery under the CSA of environmental cleanup costs arising from performance of a contract during World War II.”<sup>466</sup>

While this case further solidifies the position of government contractors attempting to recover CERCLA costs from cleanups resulting from World War II-era contracts, the dissent may give the government some hope in subsequent cases. Judge Schall attempts to distinguish *DuPont* by noting that while the indemnification provision in *DuPont* covered claims against “any loss, expense (including expense of litigation), or

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<sup>461</sup> *Ford Motor Co. v. United States*, 56 Fed. Cl. 85, 98 (2003).

<sup>462</sup> *Ford Motor Company*, 378 F.3d at 1319.

<sup>463</sup> *DuPont*, 365 F.3d 1367.

<sup>464</sup> *Ford Motor Company*, 378 F.3d at 1319-20. See also Major Kevin Huyser, *supra* note 446, at 176.

<sup>465</sup> *DuPont*, 365 F.3d 1367.

<sup>466</sup> *Ford Motor Company*, 378 F.3d at 1320.

damage . . . of any kind whatsoever,”<sup>467</sup> the indemnification provision here was limited to “costs for the ‘loss or destruction of or damage to property.’”<sup>468</sup> Judge Schall believed this language was “insufficient to transfer the financial responsibility for Ford’s CERCLA costs to the United States.”<sup>469</sup>

### **C. Environmental Insurance**

Another potential solution for government contractors entering into military procurements is the purchase of environmental insurance. “Environmental awareness in the late 1960s prompted insurers in 1970 to introduce a pollution exclusion endorsement for use with the comprehensive general liability policy and other commercial liability policies.”<sup>470</sup> Eventually, environmental liability insurance came into existence in the United States about 1977.<sup>471</sup>

There are eight basic types of environmental insurance available: site-specific environmental impairment liability insurance; contractors environmental-impairment liability insurance (sometimes called pollution legal liability insurance); environmental professional errors and omissions liability insurance; asbestos and lead abatement contractors general liability insurance; environmental-remediation insurance; remediation stop-loss insurance; underground and aboveground storage tank insurance; and combined

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<sup>467</sup> *DuPont*, 365 F.3d at 1372.

<sup>468</sup> *Ford Motor Company*, 378 F.3d at 1322 (Schall, J., dissenting).

<sup>469</sup> *Id.*

<sup>470</sup> David J. Dybdahl, *A User’s Guide To Environmental Insurance*, at 17, available at <http://www.erraonline.org/usersguide.pdf>.

<sup>471</sup> *Id.* at 2.

Commercial General Liability Insurance (CGL)/Environmental Impairment Liability (EIL) Insurance.<sup>472</sup>

When choosing a specific type of insurance policy, a government contractor should thoroughly examine the policy and ensure that it will cover future CERCLA cleanup costs. However, even if an insurance policy has ambiguous terms, “[i]t has long been recognized that ambiguities in insurance policies should be construed against the drafter (the insurer).”<sup>473</sup>

## VII. Conclusion

“No good deed goes unpunished.”<sup>474</sup> Clearly the saying is correct in the context of voluntary cleanup under CERCLA. As a result of the Supreme Court decision in *Aviall*, a PRP has to wait for the government to bring an enforcement action against it or enter into an approved settlement agreement with it in order to preserve its contribution rights.

Was the decision consistent with CERCLA’s intent? I submit that it was not. “As a remedial statute, CERCLA should be construed liberally to give effect to its purpose.”<sup>475</sup> It seems absurd that the drafters of CERCLA would have intended this result because it goes against the CERCLA goals of prompt environmental cleanup and fairness.

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<sup>472</sup> For an in-depth discussion of each type of environmental insurance see David J. Dybdahl, *supra* note 470, at 28; 1 MITCHELL L. LATHROP, *INSURANCE COVERAGE FOR ENVIRONMENTAL CLAIMS*, § 5.03(2004).

<sup>473</sup> Carol J. Miller & Nancy J. White, *Contractors and Developers Seek Pollution Insurance Alternatives To Bridge Gap Left By CGL Policies*, 33 Real Est. L.J. 401, 411 (2005).

<sup>474</sup> Clare Booth Luce, *supra* note 1.

<sup>475</sup> *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 514 (2d Cir. 1996) (citing *Schiavone v. Pearce*, 79 F.3d 248, 253 (2d Cir. 1996)).



What does the decision mean for government contractors seeking contribution from the United States for hazardous waste cleanup resulting from military procurements? The decision essentially means that in addition to demonstrating that the United States is a liable party under CERCLA § 107, government contractors will have to wait until the EPA pursues a CERCLA § 106 or § 107 civil action against them. With the glaring conflict of interest, it will be interesting to see how eager the EPA is in this post-*Aviall* era to pursue government contractors for cleanup of hazardous waste sites when the government may itself be liable for a portion of the cleanup costs.

Do future contractors with the United States have other options to avoid paying the entire cost of cleanup? Until the question of whether a “cost recovery” claim under CERCLA § 107 is available to PRPs seeking contribution from other PRPs is answered by the Supreme Court, the option of using § 107 will be in a state of uncertainty.<sup>476</sup> In the meantime, government contractors will want to consider indemnity agreements or environmental insurance as ways to help ensure they are not stuck with the entire cleanup bill.

Is it fair to ask the United States to contribute to a contractor’s cleanup costs in the first place? As succinctly stated by the district court in *Shell Oil*: “the American public [stands] to benefit from the successful prosecution of the war effort, so too must the American public bear the burden of a cost directly and inescapably created by the war effort.”<sup>477</sup>

To conclude, the Ninth Circuit Court of Appeals in *Carson Harbor Village* said it best: “Clearly, neither a logician nor a grammarian will find comfort in the world of

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<sup>476</sup> See discussion *infra* Sections II.A.2. & VI.A.

<sup>477</sup> *United States v. Shell Oil Co.*, 13 F. Supp. 2d 1018, 1027 (C.D. Cal. 1998).

CERCLA. It is not our task, however, to clean up the baffling language Congress gave us. . . . Transported to Washington, D.C. in 1980 or 1986, armed with a red pen and a copy of Strunk and White's *Elements of Style*, we might offer a few clarifying suggestions."<sup>478</sup> My clarifying suggestion would be to include an explicit right of contribution for PRPs who voluntarily clean up a hazardous waste site. To quell the fears of those opposed to this type of CERCLA amendment because of the belief that it will result in unsatisfactory cleanups,<sup>479</sup> the amendment would also have to include explicit language that if a PRP's voluntary cleanup fails to substantially comply with the requirements of the NCP, the PRP is precluded from recovering from other PRPs. While it may appear simple on the surface, any solution involving Congressional action becomes aggravatingly complex.

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<sup>478</sup> *Carson Harbor Village, Ltd.*, 270 F.3d at 883.

<sup>479</sup> Brent J. Horton, *CERCLA's Contribution Provision: Must a PRP First Face An Administrative Order Or Cost Recovery Action? A Proposal for Amendment*, 53 SYRACUSE L. REV 209, 237 (2003).